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INVESTIGATION OF THE BACKLOG IN BLACK LUNG CASES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LABOR STANDARDS

OF THE

COMMITTEE ON EDUCATION AND LABOR HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

HEARINGS HELD IN UNIONTOWN, PA, MAY 3; WISE, VA, JUNE 7; WASHINGTON, DC, JULY 11; AND WILKES-BARRE, PA, SEPTEMBER 9, 1985

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INVESTIGATION OF THE BACKLOG IN BLACK LUNG CASES

FRIDAY, MAY 3, 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:30 a.m., in the Mount Vernon Inn, 180 West Main St., Uniontown, PA; Hon. Austin Murphy, presiding.

Members present; Representatives Murphy and Petri.

Also present, Representatives Staggers, Mollohan, Gaydos, Murtha, Rahall, and Wise.

Staff present: Thomas Lamb, staff director; Richard Fiesta, counsel, and Dorothy Strunk, Republican senior legislative associate.

Chairman **Murphy**. As chairman of the Labor Standards Subcommittee of the U.S. House of Representatives, I have convened today's hearing here in Uniontown, PA, to investigate the massive backlog of black lung cases in the adjudication process at the U.S. Department of Labor.

This is indeed a deplorable situation which the General Accounting Office, in an October 1984 report, estimated could take as long as 35 years to bring down to a manageable level. Meanwhile, justice and basic fairness are obviously denied to disabled miners and their survivors when they must wait years for a final decision on their disability claims.

This is certainly a matter which requires prompt attention by the officials at the Department of Labor. We hope that it will receive the attention it deserves from the new Secretary of Labor, William Brock.

This is the first in a series of hearings I have scheduled on the black lung program. There is a second field hearing scheduled for June 7 in Wise, VA, and the possibility of at least one other field hearing by this subcommittee before we move the setting to Washington to hear from administration witnesses.

It is my understanding that the Government Operations Committee's Subcommittee on Employment and Housing is also looking into backlogs in the black lung program and is considering at least one field hearing on the subject. I welcome this additional oversight activity. Many of us here today can attest to the difficulty in getting the Department to act under this administration.

Previous attempts to obtain timely and more complete information on black lung program problems have, until this week, been largely unsuccessful—in many cases, requests for information by my staff are refused if the request is not in writing. Even then, a prompt response is far from assured.

On March 6, 1985, an interrogatory letter drafted by Mr. Mollohan and signed by 31 Members including the Members gathered here today was sent to the then acting head of the Department, Ford B. Ford. The response to that letter finally arrived this week, a month and a half delay. My staff and I are currently studying that response in preparation for the upcoming Washington black lung hearing.

When the subcommittee meets in Washington with the Labor Department, I intend to focus primarily on the Department's efforts to reduce the backlog. Recommendations in the recent GAO report as well as provisions in recent compensation legislation to expand the membership and staff of the Benefits Review Board certainly provide a basis for action. We are hoping, in addition to that, to recommend to the Congress that interim benefits be paid while the board of review whiles away its time and wastes the time and lives of many of our miners who are not receiving their benefits.

Today, in Uniontown, the subcommittee hopes to obtain a more complete understanding of the human dimensions of this problem and to discern whether any legislative remedy in addition to that is required.

Our witnesses today include constituents of mine who are victims of this disease, and are not only victims of the disease, but victims of the administrative process which delays their final determination—in many cases, for years. Indeed, quite a few miners have died before benefits are awarded forcing their survivors to initiate and process their claims all over again.

Many cases that are presently backlogged in the system were originally filed in the mid-seventies, and they are only now approaching a final determination. I do not believe that such a system properly serves the population and the people that it was created to assist.

We'll also be hearing from officials of the United Mine Workers of America, who have a considerable active and retired membership in our district, and I believe in many of the districts of the members assembled here today.

The UMW experience with the black lung program has been long and of late, very frustrating. I am sure these UMW officials will be able to give us some insight into the claimant's view of the black lung program.

As an overview, we will be hearing testimony from several local attorneys who are involved in the practice of compensation and black lung compensation laws. I believe that we will benefit greatly from the observations of claimants and their counsel.

Administrative delays and procedural obstacles seem to be all too often the hallmark of the claimant's experience with the program. Without professional counsel, I would venture to say few victims would be able to stay the course through adjudication, appeal, and review. We hope they will be able to give us examples of the kinds of problems their clients are experiencing.

Finally, I would like to welcome all of you here in Uniontown this morning. I deeply appreciate the time and effort of all of you who are appearing before the subcommittee today. I am sure you realize that we cannot hear from all of you today, even though we would like to.

I want to state that you may submit to my office or any of my offices, or to any of the Members who are assembled today, any testimony that you might have, and that can come in letter form. We will make those letters part of the official record of these hearings because although many of you, I know, want to talk to us and tell us your problems today, we do have a time constraint. The Congressmen have to get back to their home districts to complete their weekend, and I hope you will cooperate with us and give us your testimony in some form of writing and it need not be today. It can be a followup to any of our offices, and we will make it a part of this testimony.

I am grateful for the support of my colleagues, who have shown in our collective efforts to improve the black lung program. Quite frankly, I am amazed that we will have with us today eight Members of the Congress of the United States from several different districts.

The collective influence throughout the entire membership of the House will go a long way to assuring the necessary resources that are available to continue to improve the black lung program in the months and years ahead, and I will recognize those Members who are with me today, and extend to them my personal thanks for them setting aside matters that they had to do in their own districts to be here in Uniontown with us.

First, Congressman Joseph Gaydos, who represents the lower Monongahela Valley and the McKeesport/Clarton area, going into Pittsburgh. He is a ranking member on the Labor Committee in the Federal House.

Mr. Gaydos, do you have any opening remarks?

STATEMENT OF HON. JOSEPH GAYDOS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Gaydos. I will make them very short because we are here to take testimony. But, I always had an affinity with Uniontown because the people here are like the people I represent back home, in fact, a lot of them from back home moved up here, and Uniontown is just like McKeesport and Rankin—different places like that.

Let me say this, 15 years ago, I want to emphasize that, people were telling us in Washington, DC, that you will never pass a pneumoconiosis bill. That is the first legislation that provides for national compensation. I do not think our people realize that.

This is the vanguard of all modern type of legislation dealing with compensation crossing state lines as such. You all remember Congressman John Dent, and at the time he was a leader in that fight, and I was on his committee.

So, I want you to know they told us then that it would not work. We are here today primarily to make sure it does work and to keep it working. We are trying to even enlarge upon it.

So, I want to conclude. I can sit here and talk to you for an hour but that is not the purpose of this hearing. I want to thank my colleagues for coming here today.

Their problems are very similar. Mr. Mollohan and Mr. Wise are here, and I think that I should let our people here in Uniontown know that you are probably going to see, when the other Congressmen come, probably seven to eight of the most active Congressmen down in Washington, dealing specifically with the black lung legislation and all directly and indirectly associated legislation.

I am personally proud, as the dean of the delegation in Pennsylvania, to participate in this hearing, and to be here with the members of this committee, and I want Mr. Murphy to know this. The people in this district should be doubly proud of him because ever since he came down from the Senate into Washington, Mr. Murphy has always been there in the forefront. Please believe me. He is not by accident the chairman of this subcommittee. We all got together and we made some changes in the Education and Labor Committee to make sure that Murphy got into the sensitive area.

He is a hard worker, and it is our pleasure to be here now, and I really am going to stop. We are going to try to enjoy the hearing.

Chairman **Murphy**. Thank you very much, Joe.

A young Congressman from West Virginia to my right, who has been very active in—since he arrived in Congress a few years ago in attempting to unsnarl the black lung programs, succeeded his father in Congress, who was, along with Joe Gaydos and John Dent, one of the leaders in originally passing the black lung legislation, Alan Mollohan.

Alan.

STATEMENT OF HON. ALAN MOLLOHAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. **Mollohan**. Mr. Chairman, I want to thank you very much for scheduling this hearing. It is crucially important to the constituents of my district, and looking out over this crowd, I know it is crucially important to the constituents in your district. But, I have always known it was very important to the constituents in your district because of your efforts to make sure that the black lung program worked.

I know you and Joe Gaydos, along with my colleagues in West Virginia, Congressman Wise, have been extremely sensitive to this program.

Since 1980, there has been a dramatic falloff in the number of black lung claims that have been approved. It is very frustrating in my office because we get hundreds of letters from coal miners every year complaining that their claims are not being processed in a timely fashion. And, that is really the crux of the frustration. We have a program and it is not now working, not because the program is not conceptually good, but because everybody is being frustrated in not getting their claims processed in a timely fashion.

And, as you pointed out, and as Congressman Gaydos pointed out, a coal miner can actually die before ever getting a resolution to his claim. There are 20,000 claims backlogged at the ALJ level, over 5,000 claims backlogged at the benefits review board level, and I think that there is a lot of momentum building in the Congress on this issue now, and I know with your leadership, Mr. Chairman, we are going to get something done, and I appreciate very much the opportunity to be up here in Uniontown from my adjoining district, to help get that started.

Thank you very much. I look forward to the testimony.

Chairman MURPHY. OK. Thank you very much.

I forgot to mention, you have the adjoining district to the west and south of here. Thanks for being here.

Another young Congressman from West Virginia, that is all they have is young Congressman down there, Joe, is Congressman Bob Wise from central West Virginia. He is on the Government Operations Committee, and they are convening likewise joint hearings with us on the delay in the black lung. Government Operations has the jurisdiction over many of the bureaus and departments. We have jurisdiction over the programs, and the Department of Labor.

We are going to work together. Bob has been very instrumental in coordinating this hearing today, and I want to thank you, Bob, for coming up from central West Virginia this morning to be with us.

Bob Wise.

STATEMENT OF HON. BOB WISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. WISE. Well, thank you, Mr. Chairman. This is as far north as I have to come to get kielbase. We do not have it in Charleston.

I want to thank you very much, Mr. Chairman, Austin Murphy. I want to congratulate you for two things. First of all, getting a crowd like this obviously demonstrates the interest and concern about the black lung program, and the kind of close contact you have with your constituency. The second thing is getting this many Members of Congress together.

I usually do not see this many in a committee hearing in Washington, and, so, it is good to see all of us here together.

We all know the figures. Congressman Mollohan stated that the General Accounting Office, just last year, reported that over 21,000 cases are backlogged through the administrative law judge level, and 5,200 cases are waiting to be heard before the Benefits Review Board.

The General Accounting Office also estimated that given the present staffing levels, it will take the Department of Labor over 35 years to reduce its backlog of back lung cases to levels considered reasonable. Even with the changes that are being made, adding new members of the Benefits Review Board and contracting out for new administrative law judges, it is still estimated it would take 9 years to reduce the backlog at the ALJ level, and 12 years at the Benefits Review Board level.

This is what I have to tell my constituents when they come up to me and say I have got black lung and I want to file a claim—if you file a claim or an appeal, it is going to take you about 3½ years to have it decided.

Mr. Chairman, I have just two cases I wanted to mention that I pulled out of my files. One of them is a man, a miner, who had filed his initial claim in December of 1972 and he was denied. He refiled after the law changed in 1978. He was finally granted his benefits in June of 1984, 12 years later. The problem is that the

Federal Government has appealed that. Of course, they will have to go through several more years on that appeal, and, of course, he will not get any interim benefits in the meantime.

Another woman, a widow, filed for widow's benefits in 1977, but because she cannot afford the medical testing necessary, the exhumation and the autopsy, she probably will not get those benefits. Her daughter wrote me and I think it summarizes the problem. Her daughter said, "if they wait much longer to award mom her benefits, they may not have to pay at all." I know she is just one of many. We know she is just one of many, too, Mr. Chairman.

Thank you for calling this hearing.

Chairman **Murphy**. Thank you very much, Mr. Wise.

We will now call to the witness table, the first two witnesses, Attorney Charles Gentile, who will be representing the interests of a claimant. So, attorney Gentile, will you come up to the table, and George Haller, who is a claimant. Is Mr. Haller here? George Haller? OK. Will you come up to the table, please, Mr. Haller?

[Pause.]

Chairman **Murphy**. The plane has arrived.

[Pause.]

Chairman **Murphy**. I can truly say now that I have never seen as many Congressmen attending a committee meeting or a hearing in my 9½ years in Congress. Joe, how about that?

I want to thank the four members who have just arrived. They came up on a special plane from Washington this morning. Again, getting away from their home districts to be with us in Uniontown, and we will introduce them by virtue of seniority, to be fair.

Our colleague from just to the east of here, representing Cambria, Somerset and parts of other counties to the east of here, Westmoreland to the north of here, a member of the House Appropriations Committee, and the subcommittee of the Appropriations, which handles many of our funds for black lung and coal and all of the other programs that we are concerned with.

I want to thank you, Jack, for dropping your home district duties this morning and being with us.

STATEMENT OF HON. JOHN P. MURTHA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. **Murtha**. Thank you very much.

Thank you very much, Austin. Our plane was late, which means that I have to go on to another appointment, but I want to say this, how much we appreciate your efforts because I have 12,000 coal miners in my district, how much I appreciate you folks coming in to testify and Austin holding this hearing and other Members attending.

This is so important to all of us. We have been hammering the Department in Washington about the need for more people to take care of these claims, to get these things done, and, of course, Austin has been at the forefront and all the other Members here at this table have been leading this drive.

Joe Gaydos is one of the most senior members on the Labor Committee, the chairman, as a matter of fact, of a Labor subcommittee. Nobody works harder trying to get these provisions into the law, and then they do not enforce them, and, so, we are really upset and I will read this hearing over very carefully when we get back, and I know Austin will tell me about it because being on the Appropriations Committee, he pesters me for everything for this district. I hardly get what is left for my district.

So, I appreciate very much being here and appreciate Austin and the rest of the Members holding this hearing.

Thank you very much, Austin.

[The prepared statement of Hon. John P. Murtha follows:]

Prepared Statement of Hon. John P. Murtha, a Representative in Congress From the State of Pennsylvania

Please let me begin by thanking Subcommittee Chairman Austin Murphy for scheduling these hearings to focus on this very serious problem, and for his continuing attention to the black lung problem. Chairman Murphy's efforts have been vital in helping to insure a decent life for thousands of American miners and their families who have been ravaged by black lung. It has been a pleasure to share this workload with him, and continue on this vital effort.

The point we are discussing today is actually very simple. It goes like this: in the files in my office, there are black lung cases that have been pending since 1976 and 1977 without resolution; we have reached a point of bureaucratic delay where we have come to consider the final resolution of a case filed in 1981 to be a victory in quick action for the constituent; delay, excuse and complications have become accepted as the normal order of business.

The truth: the situation in hearing black lung claims has become totally unacceptable. Unfortunately, it has become a classic case of the government's bureaucracy failing to act, failing to be responsible, and failing to do its job.

The bottom line: thousands of miners and their families are being discriminated against. This is an established federal program by the will and direction of Congress. It is the place of the administrative arm of the government to implement that program. Where miners meet the established criteria they deserve their benefits that we have authorized for them in Congress: where for a reason they do not qualify, they deserve a quick answer so they are not kept in an uncertain financial situation; and as a general principle, all the citizens of this country want their programs administered with more efficiency than has been evidenced in this program.

I will not dwell on the numbers of the situation, because I am sure they will be mentioned by others today. Suffice it to say that the recent General Accounting Office report indicated black lung appellants have to wait an average of 3½ years for a hearing at each step of the appeals process; that there was a 20,967 case backlog at the end of February up from 484 in 1979; and that at present levels it could take 35 years for the caseload to be cut to a manageable size.

Moreover, this is not a problem that requires complicated solutions. I suggest we need to bring some common sense and rationality to the program. Please allow me to outline some suggestions.

1. With our colleague Congressman Alan Moilohan from West Virginia, Chairman Murphy and I joined in writing to the Labor Department in early March requesting answers to questions designed to move this program more rapidly forward.

Among those steps was quicker action on last year's Congressionally mandated expansion of the Benefits Review Board. Information and reaction was requested on the suggestions we have made to speed the process by some combination of hiring additional administrative law judges; borrowing additional administrative law judges from other agencies; and contracting for more retired administrative law judges.

Part of this surely is a manpower problem. While we are all concerned about the administrative costs of government, it is evident that in the long run, the real savings come from expediting these cases, eliminating the back log and then being able to work with a small staff on a reasonable number of cases.

2. By federal regulations and/or Congressional mandate, I would suggest that penalties be invoked on the Government for delay in handling cases. At the present time, as an example, if the Internal Revenue Service fails to process a refund claim within 15 days, it pays 13% interest on the refunds. If the I.R.S. can handle its multitude of claims within that time, so can the black lung process. At each stage of the process, let us establish a 45 day limit or place a penalty on the government for their delay.

3. The delay is nowhere more reprehensible than in the cases where a miner begins receiving benefits only to have it turned over several years later by an administrative law judge and then requiring the miner to pay back what he has received in benefits. Is the combination of delay and the pay back not one of the cruelest penalties ever enacted by the Government? I have sat with constituents where 3 or 4 years had lapsed between the decisions and where they now faced a bill to the Government of as much as $20,000. That is ridiculous. Let us move this system forward swiftly at each stage, and in so doing let us eliminate the situation where such a massive pay back of benefits can occur.

4. Let us rededicate ourselves to continue to attack the problem at its source. As I have mentioned for several years, it makes no sense to assess $1 billion a year in benefits and spend virtually nothing to attack the black lung problem. Through my amendments, we now have major new research underway on attacking the very problem of black lung disease.

In concluding, I would like to quote from a recent editorial on this problem that appeared in the "Johnstown Tribune Democrat" and add some final thoughts to their comments.

"There have been allegations," it was written in the April 14 editorial, "that the backlog is a deliberate attempt to suffociate the program. That is no way to deal with a program that is tied so closely to people's lives."

"If the program no longer is warranted, Congress and the President should have the courage to tackle the issue in the open debate and then decide whether to continue it. If the program warrants continuance, then it should be operated in an efficient manner."

"Congressional delegations from Pennsylvania and other coal producing states should not rest until provisions are in effect for resolving the backlog. Yet it is puzzling that they allowed the appeals process to get so badly out of hand in the first place."

My observations are these: first, Congress had debated this program and its continuance is warranted, and the program will continue to aid the miners and families severely affected by black lung disease; Second, I agree that the program demands much greater efficiency, and I believe the steps outlined here will help greatly toward that goal; and third, we have given the Labor Department a fair chance to indicate a willingness to work with us, and have expected them to administer the program wisely—with the clear record which shows an absence by the Department for that goal, it is now up to Congress to force and demand the necessary changes to make this program work for the citizens of the Nation. We intend to do just that.

Chairman Murphy. Thank you, Jack.

The next member I will introduce is our ranking minority member on my subcommittee, and a ranking member on the Education and Labor Committee, a young man from the State of Wisconsin, who has shown a great deal of interest in the subcommittee since he and I were both assigned to it in January of this year, Congressman Tom Petri from Wisconsin.

Mr. Petri. Thank you very much.

I am delighted to have the opportunity to be here, Representative Murphy. I am from Wisconsin, not a coal mining area of the country, and that is why I wanted to come to learn more about the problems that we are having with the black lung program because it comes under the jurisdiction of the Labor Standards Subcommittee.

I am delighted to see such a turnout and I am looking forward to hearing the testimony of the witnesses here this morning.

Thank you.

Chairman Murphy. Thank you, Tom.

Another young Congressman from West Virginia, and the senior member of the West Virginia delegation, he also chairs the Mines and Minerals Subcommittee on the full Interior Committee, on which I serve as one of his ranking members, my good friend and a guy who has done a lot for the black lung program and miners in general, Congressman Nick Rahall of West Virginia.

STATEMENT OF HON. NICK J. RAHALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. Thank you, Austin.

I deeply appreciate the opportunity to participate in your hearing here in Uniontown. It is very important to get out of the confines of our Nation's Capital and into the heart of the coal regions of this Nation and hear directly from those who mine our coal about the problems they face on a daily basis. That makes this hearing all the more important.

I represent southern West Virginia. Indeed, I am very glad to see our entire West Virginia House Delegation here at this hearing today. I might add that in southern West Virginia, I have perhaps more members of the United Mine Workers Union than any other congressional district in the Nation.

As we strive to produce more coal today, it is very important that we make sure that coal is UMWA coal. We also must assure the health and safety of those who mine coal. For those stricken with black lung, we must ensure that they obtain the compensation that is due them from our Federal Government, and that those benefits are recieved in an expeditious manner.

That is why we are here today. I salute Chairman Austin Murphy and his Subcommittee for conducting these hearings.

Chairman MURPHY. Thank you, Mr. Rahall.

Finally, another young Congressman from West Virginia, who has succeeded his father, and his father was a leader in coal miners rights and benefits for many, many years. You all remember Harley O. Staggers from West Virginia. Well, this is his son, Bucky Staggers, and he has been very instrumental in helping us since his arrival in Congress a couple of years ago.

Bucky?

STATEMENT OF HON. HARLEY O. STAGGERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. STAGGERS. Thank you, Austin.

I, too, am pleased that we are here and the entire delegation from West Virginia is here. Of course, I am just down the road. I represent Morgantown, WV. I represent one of the largest districts east of the Mississippi. We have problems with coal mining and coal mining benefits, and black lung benefits in all 20 counties that I represent.

So, I am pleased that we are having these hearings, and I am pleased to be here. I am also pleased that the dean of the delegation is still with us after our flight in. He almost flew out the door when the door would not shut. I am glad to see that we are all here.

I also applaud the committee and Mr. Petri from Wisconsin for taking the time to be with us today, and also Austin for holding these hearings.

Chairman MURPHY. OK. Thank you very much, Bucky.

I want to thank Mr. and Mrs. Estanish for making their facilities available to us today. I want to thank Mayor Paul Bortz for providing the full courtesies of his office in organizing the hearing and the transportation and so forth, and I understand, Mayor, you want to present my colleagues in Congress with a little memento of their visit to Uniontown, is that right?

Mr. **Bortz**. Yes; thank you very much, Congressman.

A true friend is Congressman Murphy to Uniontown and to Greater Uniontown and the surrounding county areas, and we are proud to host this event today, and you gentlemen, distinguished guests from Washington, it is our distinct pleasure to have you here in Uniontown, to welcome you with open arms.

This is probably one of the first times that Uniontown has been able to host such an event, and I also want to thank each and every one of you for taking your time to come here for this hearing.

At this time, I would like to present to Congressman Murphy and his fellow colleagues, an Ambassador of Goodwill for the City of Uniontown so that they can pass the word in Washington just where Uniontown and Fayette County is.

Thank you.

[Applause.]

Chairman **Murphy**. Thank you.

[Pause.]

Mr. **Mollohan**. Mr. Chairman, I'd like to thank the Mayor. I think this was the first meeting of the West Virginia delegation in a long time that was held here in Uniontown. Thank you.

Chairman **Murphy**. OK. Now that all of the introductions are over with, we will proceed with our first panel of witnesses, and we will first recognize attorney Gentile for his remarks. Counselor?

STATEMENT OF CHARLES GENTILE, ATTORNEY, UNIONTOWN, PA

Mr. **Gentile**. I want to thank the committee for inviting me here to give a brief expose concerning the——

[Pause.]

Mr. **Gentile**. Concerning some of the problems that are obviously apparent in the country. I am a practicing attorney here in Uniontown, and, at one time, I used to do a significant practice in the black lung area.

But, because of the problems that have been associated with the administrative procedures of the program, I have somewhat limited my practice in that area now. But, I do have one case in point that I would like to call to the attention of this committee.

I represent a widow claimant, whose husband had a long history of employment in the underground mines in Pennsylvania and Ohio. He initially filed a claim for black lung benefits under the Social Security Administration when the program was administered by the Social Security Administration, in April 1975.

In April 1976, he passed away. Now, his widow has pressed on with the claim and has gone through the normal procedures of collecting innumerable records and documents from fellow employees that he had, having him work in the mines before Social Security was in effect.

She was required to obtain affidavits from people that were fellow employees, and has just gone through a very trying experience in satisfying the Department of Labor with the information that they have requested.

And, I certainly commended her, and that is one of the reasons why I continue to represent her, because she has done a very excellent job in assisting me in obtaining that information.

The claim is still not final. She is pending a final hearing and the problem right now, and it is most unfortunate for her, that she seems to be caught up in a bureaucratic mix-up between the Department of Labor and the last identifiable employer.

There is a dispute right now between the Department of Labor and the last employer that he worked for, and they are battling to determine who should pay her benefits. So, this is one area that I think your Committee should be aware of, that since the law has been changed and since the responsibility has now shifted to the employers, there seems to be an ongoing battle between the Department of Labor and the coal mining industry as to who is responsible for paying these benefits.

Unfortunately, for this lady, she has been caught up in that, and it really just not a question of the fact that her husband had pneumoconiosis, the problem seems to be now that she is apparently being delayed because of a problem by the Department of Labor and the last identifiable employer as to who should pay her, and I think that is a significant area of concern, and I think that there are a lot of cases that fall within this category.

Thank you.

Chairman MURPHY. Thank you very much, counselor, and the next claimant is Mr. George Haller.

Mr. Haller.

[Prepared statement of Mrs. Mary Gentile follows:]

PREPARED STATEMENT OF MARY GENTILE

My name is Mary Gentile. I live at Chalk Hill, Fayette County, Pennsylvania. I am a widow and my husband's name was Christopher R. Gentile. He died on April 8, 1976. I have one son who is a practicing attorney in Uniontown, Pennsylvania.

My husband was born in Somerset County, Pennsylvania on March 5, 1918. He worked as a young boy in the underground coal mines in and about Somerset County, with his father and older brothers. At the age of eighteen he moved with his family to Ohio where we lived until 1969 when my husband and I and our son moved to Fayette County, Pennsylvania.

While living in Ohio my husband worked in various small undeground mines in and about Mahoning and Columbia County. This was before the organization of labor unions and needless to say, the conditions in the mines in those days were quite bad. Shortly after the war my husband, who for sometime was stationed in Alaska, worked in coal and gold mines there.

In 1969 my husband became employed by Kaiser Refactories and operated a clay and coal mine for them here in Fayette County. This was a strip or open mine.

Throughout my husband's entire work history, he was always a hard worker and very dedicated to those jobs which he had. He became ill in 1972 and passed away on April 8, 1976. In 1974 my husband became disabled and was unable to continue his employment with Kaiser. He filed a federal black lung claim at that time through the Social Security Office in April of 1975. During this period of time, my husband was quite ill, however he was required to undergo the normal examinations for breathing and x-rays. I often remember how difficult it was for him to make these appointments because of his illness. My husband continued to press on with his claim, however, he did not live long enough to see the results of all of his efforts. My claim, as his widow, is continuing with the U.S. Department of Labor, however, I was awarded interim benefits in March of 1982. I continue to receive those benefits.

It is most unfortunate for claimants who are usually quite ill to have to undergo the rigors of all of the tests and examinations that are needed in order to determine these claims. It is specifically trying on widows who, like myself, experience great difficulty whenever I am called upon to recall my husband's past work experiences. Often times these are things which we would like to strike out of our minds. Fortunatey I have been receiving interim benefits, however, I am sure there are many claimants and many widows who have not been as fortunate as I and who are still waiting for claims to be litigated. Thank you.

STATEMENT OF GEORGE HALLER, CLAIMANT, VANDERBILT, PA

Mr. HALLER. I'm George Haller, 74 years old, and a former coal miner. I would like to introduce you to my wife of 72 years, Mary Elizabeth, who is with me today, and to talk to you about the problems miners and their families have a hard time against.

I was employed in the coal fields, in the coal mines, since 1934 through the early sixties, off and on. The first mine I worked at was Yough Coal Co., mine No. 1.

Then, the Pittsburgh Coal Co., Somers Mine, and Banning 2 mine. United States Steel Corp., Maxwell Mine. Matway Coal Co., Gibson Mine, and my wife is a better speaker than I.

I am going to have her——

Ms. HALLER. Well, he has made a mistake already. Said he had been married to me for 72 years. Fifty-two years.

In the early fifties, he started having breathing problems, and in 1959, Dr. Cox told him to get out of the coal mines because he had black lung.

Because he had to support a family, pay bills, and have some sort of medical coverage, he had to continue to work. He filed for black lung benefits in 1972, but was denied.

He continued to fight for his claim, and on October 11, 1978, the claim was transferred to the U.S. Department of Labor. He was awarded benefits by the Department of Labor's Administrative Law Judge, finally, 10 years later, on October 25, 1984.

It took such a long time before the Department of Labor would let you know anything about your claim. It would take a couple of years. In 1979, I then contacted Congressman Austin Murphy on our behalf to make an inquiry regarding our claim.

My husband went to see a lady in the black lung office in Uniontown, to see what was going on about our claim because we could never hear anything from anyone. She called around everywhere and she finally called Johnstown. They could not find it, and, finally, they did find it at the bottom of the file, and they said that they thought that he had given up.

And, one of the hardships for us, one time we had to make a trip to Pittsburgh to a hearing in the Federal building. My husband was feeling bad that day. The weather was very hot, and the humidity was high. I had to drive. I did not know my way around to drive a car in the heart of Pittsburgh.

So, we took a cab and we happened to get an old cab, that did not have any air-conditioning, the windows were wound down, and the fumes and the heat just about did my husband in. He could not hardly breathe. He could not hardly walk. It took us a long time, even after the cab let us off, to get to the law judge's office. I thought I was going to lose George that day.

And, I did not know exactly what I would do then, if I would, because I still had a young son in high school, and we got turned down that time, too.

And, Dr. Cox told him a long time ago, back in 1959, that he had black lung, but George continued to work, and as long as he could to support us. Some of our worst problems were going to the hearings and the doctors.

When you did not feel well to begin with, I mean my husband did not feel well to begin with. He usually has to have—stay a whole day and you are pretty tired out by the time you get home.

I really hope this hearing helps some other people so they can get their benefits and enjoy life a little before it is too late to do it.

Chairman MURPHY. Thank you very much, Mr. and Mrs. Haller. Do any of the Members have any questions to ask any of the witnesses?

Mr. Gaydos would like to ask you a question, counselor.

Mr. GAYDOS. I would like to address this to the counsel. You mentioned that case. I wonder if you could make the case available to the committee, to the chairman. I would like to take a look at it and I can assure you we will not do anything that will interfere with your progress of the case, but I want to ask you one question.

Is there any question as to whether pneumoconiosis has been established or not by x rays and competent medical care?

Mr. GENTILE. Well, in my opinion, of course, there is not, and I think that is part of the problem, because I think if I had any suggestions to make as to how the procedure should be changed, it would be simply that it should be a multiphase type determination rather than keeping the claimants, particularly widows, waiting. I think they should make determinations initially as to whether or not the claimant or the deceased miner has established pneumoconiosis.

If that is the case, the dispute then rests between identifying a responsible employer or if it should be the Department of Labor, then I think the widow or the claimant should receive benefits. The money is going to be forthcoming anyway, and that she or the claimant should not have to continue to live indecisively as to whether or not these benefits—she is going to have them pay or what exactly is going to happen.

So, I think they should set up a multiphase type thing, and if it is just simply a question between the Department of Labor and the identifiable employer, then I think she should continue to receive the benefits and not have to worry about the——

Mr. GAYDOS. All right. That is the important thing we want to get on the record, you understand. Exactly that. I think your suggestion is quite timely, and I think in the professional manner you present it, that is what we are going to take back to Washington, and, hopefully, eventually, effectuate some kind of a change in that procedure.

Thank you.

Chairman MURPHY. Thank you. Mr. Mollohan has a question.

Mr. MOLLOHAN. Thank you, Mr. Chairman.

We have received reports about the backlogs that exist at each level.

What is the cause of the backlog? Is it in making the determination? Is it deciding who is going to pay? Is it that they do not have enough personnel to process the claims? How would you identify the cause of the backlog?

Mr. **Gentile**. Well, I think it is a multitude of problems. I think preliminarily, the problem was that there was just not enough personnel to administer the complicated medical evidence that had to be presented.

I think this was really compounded when the law was changed requiring that an identifiable employer be responsible for paying benefits. So, I think it initially started out because of a backlog in determining the medical evidence and what was to be considered, what was not to be considered, scheduling appointments for claimants, things of that nature, which took time.

I think that once they attempted to resolve that problem, then they really slid backward when they got caught up in the problems that now exist between the Department of Labor and identifying a responsible employer.

Mr. **Mollohan**. So, one of the big problems is fixing liability, the question of who is going to pay for it?

Mr. **Gentile**. I think that is one of the primary problems, at least as I have seen it in a number of cases that I have.

Mr. **Wise**. Will the gentleman yield a moment?

Mr. **Mollohan**. Yes, indeed.

Mr. **Wise**. Having discussed this question with counsel in my district, I recommend that whenever there is any kind of a controversy in black lung cases, they consult an attorney who handles black lung.

But, you made an interesting remark that sounded as though you were getting out of the black lung area of law, and I just wondered if you would care to comment on why you think this is happening—whether it is more difficult for people to get adequate legal representation?

Mr. **Gentile**. In answer to your question, the cases take so long to be litigated and it is just the type of problem that I think a sole practitioner like myself, we just cannot afford to put forth the amount of effort that is involved in the case like this, and have to wait for long periods of time in order to be paid.

It is unfortunate for the claimant. I think that there is a problem that claimants, that there is not enough lawyers out there to represent these people. I think that there are a significant number of lawyers that are now specializing in this type of work because it is becoming more of a specialty. The law has almost mandated that with some of the recent changes that have gone into effect.

So, I think there are enough lawyers out there to handle these cases. The problem is that you find that it takes so long to have these cases determined, that a number of lawyers, for economic reasons, just cannot afford to continue on with cases that are 8, 10, 12 years old.

Mr. **Wise**. In my experience, I noticed that the companies do not have any trouble carrying those files that long.

Mr. **Gentile**. That is correct.

Chairman **Murphy**. Is that it?

Mr. **Wise**. Yes.

Chairman MURPHY. OK. Thank you very much. I want to thank those witnesses.

The next witness is Mr. James W. Kelly, president of district No. 4, the United Mine Workers of America, based in Masontown, PA, and he is accompanied by attorney Martin Sheinman, and Mr. John McCarroll, both of the district 4 staff.

[Pause]

Chairman MURPHY. Mr. Kelly, you may proceed.

STATEMENT OF JAMES W. KELLY, PRESIDENT, UNITED MINE WORKERS, DISTRICT 4, MASONTOWN, PA, ACCOMPANIED BY MARTIN SHEINMAN, ATTORNEY; AND JOHN McCARROLL, DISTRICT 4 STAFF

Mr. KELLY. Thank you, Congressman Murphy, and your colleagues.

I am James W. Kelly, presently serving as president of district No. 4, United Mine Workers of America, located at 32 South Main Street, Masontown, PA.

I take this opportunity to thank the congressional committee for allowing me to appear before you today.

I feel it is a known fact that the backlog of black lung cases at the Department of Labor is a deplorable situation, which requires immediate attention.

I would like to present to you on behalf of the coal miners, the widows and dependents, some things I feel must be done to improve the black lung program.

First, I would like to talk to you and your colleagues in regard to the holdup in the filing process from the day one files their claim for black lung until the date for a hearing before the administrative law judge.

As you know, Mr. Chairman, there is over 25,000 backlog at this time and increasing daily. The record shows only 6,000 cases are being heard per year at the rate. Miners filing for black lung today will have to wait at least 5 years before his case is heard in front of an administrative law judge, according to the Department of Labor records.

This is ridiculous, and it gets worse when the appeal process takes longer than your original proceeding. When the appeal process takes longer than your original proceeding to get through, causing many miners to pass along before a decision is finally rendered.

Mr. Chairman, that leads to another thing I know you and your colleagues are very interested in, and that is the widows of the coal miners. When our brother passes on, we have a very hard time getting black lung benefits for his widow.

Again, we need the language changed because even if the man had been receiving the black lung, she has to prove that he died directly from that. Let me give you an example of what we have run into in that respect.

Just recently, we had a coal miner that was drawing his black lung, and it was in Uniontown, across the street, and he got hit with an automobile, and it killed him. That woman had an awful time, and as far as I know, has not got her black lung since then because they claim he did not die directly from the black lung.

That is ridiculous to put people through things of that nature. As you know; it generally requires her to have an autopsy and to furnish slides costing several thousand dollars to prove what we have already known. In order to prove the miner died from black lung, she must file an appeal which is time-consuming and also adds to the backlog we keep trying to eliminate.

Another reason for the backlog which we are concerned about is the B readers. I am sure everyone knows there is not enough B readers to keep up with the applications being filed.

I for one believe since the B reader, in most cases, never sees the coal miner and could not say anything about him as a person or his medical past. I strongly feel we would be better off to have and accept medical reports from family doctors and technicians who treat, examine and provide medical services for the person's needs throughout life and when the special medical services that are needed, he is there at their bedside.

This way, one could understand the reasons for the shortness of breath, and the decline in the overall health. I strongly feel that these doctors' reports and their credibility should be considered as high as any other doctors.

Therefore, I feel the backlog could and would be greatly reduced if we eliminate the compulsory reports of the B reader and accept the everyday family doctor's medical reports.

Backlogs are being caused by not having enough administrative law judges to take care of the large number of cases. We need many more administrative law judges put on immediately. I feel then we could and should employ more administrative law judges from the coal field areas, if possible.

Although we should have the hearings in the coal fields so many more hearings could be heard daily. This alone could go a long way in eliminating the backlog.

In order to reduce the backlog cases, we must make changes in the language of the Black Lung Benefits Review Act of 1981, and the Black Lung Benefits Amendments of 1981, also.

We must also change the language of *Small* v. *Wienberger* that interferes with our peoples' entitlements to black lung benefits that have or are employed around the coke yards, as they have coal preparation tipples to process the coal to sizes that can enter into the openings at the top of each oven. This process is very compatible and falls under the category known as prep plants today. These plants have been very, very dusty because tipple prep plants never had sprinklers until just recently.

Now, Mr. Chairman, here is something I wish that you and your honorable committee would look at, and look at it very hard. This is the many, many x rays which the poor coal miners have to suffer through. I think it is very, very wrong, and almost a mortal sin for those miners to take as high as 10 to 12 x rays for their black lung.

First, they have to take the round of x rays for the State black lung. Then, they have to take a round of x rays for the Federal black lung.

Mr. Chairman, this is wrong. Why cannot the Government, when they send our people to the clinics, make one set of x rays and these x rays be given to each and every doctor that asks for them to be read instead of our people taking x ray after x ray after x ray?

It is said that this could give you radiation, and then we would end up with something worse than black lung. We could end up with cancer.

Mr. Chairman, I know that you and your honorable committee would never want someone to have cancer if it could be avoided, and I think that it can be avoided, Mr. Chairman, and I think it will be up to you and your committee to see to it that this is done. While only the Government takes x rays and for these x rays to be passed on to the various doctors.

Mr. Chairman, there are many people to testify and to keep from further delaying the meeting, on behalf of the coal miners of western Pennsylvania, I want to thank you and your honorable committee for coming here this fine day and spending your time with us the almost forgotten people.

Those of us that work deep in the coal mines, mining the coal day after day, the hardships, and Mr. Chairman, I do not have to tell you because you come from this area, you know what our people go through day after day with the dust and the dirt, which they breathe and have to live with, and we make a living with, so that this great country can move forward with the energy they need.

I want to take this opportunity to thank the panel for coming here and for having us permitted to testify before you today.

Thank you very much.

Chairman **Murphy**. Thank you very much, Mr. Kelly.

Mr. Kelly, will either you or your counsel explain to us briefly the function of the B readers, who employs them, where do they operate, and why you think that they can be replaced in the process? Will you, please?

Mr. Sheinman?

Mr. **Sheinman**. Congressman Murphy and colleagues from Congress and this committee, the B reader appears to be something that came out of NIOSH, National Institute of Occupational Health and Safety.

These are people who have studied x rays and are supposed to pass a certain test given by the Government. Once they pass this test, they are clouded with an aura of alleged invincibility. The question is whether a B reader is the better x-ray reader than a board-certified radiologist or perhaps, going back to what Mr. Kelly, our president, has said, whether the family physician, who has seen this person over a period of time, makes decision after decision, oh, X so and so is a B reader, that is it, or when we try hearings, if everything was X—you know, if you just put it in computers, B readers said this pulmonary function, they could get this result.

Why does the man work in a coal mine 30 to 40 years and is extremely short of breath every week, because he smoked cigarettes, because he had broncnitis, not related.

One of my earlier colleagues said that there are plenty of attorneys around. I do not know whether there really are plenty of attorneys around, but that is an issue you should address, Congressman Wise, when you asked if there is.

I am on a modest retainer from the districts, so we do not take all the cases, and it is really hard to handle them, although we are doing our best to do it. But, there are lawyers around, but an attorney, what does he want to take the case for unless because, No. 1, the law forbids any contingency contract.

Social Security disability benefits, the law permits up to 25 percent of past due benefits to go, but you do not have that in black lung cases. I am not talking about me; I am speaking about for the general things, and that is what you are interested in.

Mr. **Gaydos**. Let me interrupt you at this point, counsel, may I?

Mr. **Sheinman**. Certainly.

Mr. **Gaydos**. Is it the accepted procedure today? When we passed this legislation years ago, the primary concern and argument involved biopsy.

Now, I would like to ask you the question, do they take biopsies at this time, and if they do not, is there any question whether they should or not?

Mr. **Sheinman**. In my experience, it has been that biopsies are considered.

Mr. **Gaydos**. They are considered?

Mr. **Sheinman**. Yes, sir.

Mr. **Gaydos**. They do not take them anymore?

Mr. **Sheinman**. Well, it is a report. There could be a lung biopsy done by——

Mr. **Gaydos**. But, that is discretionary, and in the plaintiff's case he makes that determination, is that right?

Mr. **Sheinman**. It is an invasive procedure that a person might not want to do, but that is something, I believe, that is in the regulation.

But, the idea about trying to open to more attorneys would be—you see, the attorney cannot get a fee unless he wins the case, and then he is limited for the hours. That is why attorneys do not want to take the cases, and why should they work for 8 or 10 years and not be able to even get anything but an hourly rate assuming there is a successful thing. People are not altruistic. There might be a few of them in this world, but there is not, and another problem with the backlog and I suspect maybe the members of this Committee would share, is when you try to deal with the Department, it is sort of an evasive thing. It is like a mist going along, and it is the people you deal with.

When we deal with them, we sort of get the idea that it is their Government and not the peoples' Government, and the people are working for them, and they should realize and I am sure you would agree, I see some shaking, nodding of the heads, that the people in the Department of Labor are really employees of our Government and we are a democracy, and they are our collective employees and it is more of an—you have to send seven copies of this and somebody said get all of these lists of fellow employees and where you lived in the affidavit, why they do not just take this man's statement as true and identify a responsible operator, a responsible operator certainly can catch those things.

But, the burden of running around to get these things seems to be impossible. Why do you not just take the people as true in their applications, and you get what I am driving at.

Mr. McCarroll. To get back to Congressman Gaydos' question, I am John McCarroll, and I have been with the United Mine Workers Union for a period of 35 years, working with Workmen's Comp.

About 5 years ago, Mr. Kelly asked me to come when I retired from the automobile workers, to help him out over here in district 4. Now, Congressman Gaydos, our problem is that the corporations have all the B readers. Why? Paid for. We do not have any, and when we do not have a B reader, and when we cannot get a B reader, and there are only four or five in Pittsburgh, we do not have any out here in Uniontown, we do not have any in Washington—we used to have—and Congressman Murphy, you remember old Dr. Walker. He was a B reader, and we used him.

But, guess what? Long-time U.S. Steel said he is not qualified because he is crazy. He was crazy because he was for the miners. He was not for the corporations. That is why they said he was crazy. He was crazy smart. He worked with a guy called Congressman Morgan that many of you men may remember. Congressman Murphy took his place.

They wrote this law along with Congressman Dent and they worked with them, and they were doctors. Dr. Walker had seen thousands of coal miners. That is what his practice was, taking care of coal miners, like Dr. Morgan was. Take care of coal miners.

But, oh, no, no, no. They do not count because they are not a B reader. Yet, when that coal miner gets sick, Congressmen, he does not go to a B reader, he goes over to see Congressman Morgan, and Congressman Morgan gives him his medication. He tells him what to do, and if he dies or he has to have an operation, that B reader is not around. A B reader only might see that poor coal miner once in a hearing or maybe never, and then some corporation thinks he can go in there for a test, this is ridiculous, Congressmen, what these people have to do under the B readers.

Chairman Murphy. Thank you.

Mr. Kelly. Chairman, I would like to add to—I agree with what Brother John has said, but I would like to add to what the one prior to me said in respect to eliminating the responsible operator.

I think that is one of our key drawbacks along with the other things that we have discussed. Responsible operator, that this fund was set up similar to the Social Security black lung fund, where the operators had to pay in the tonnage, enough money, security, finance for the black lung program and eliminate that responsible operator, you would eliminate your backlog.

The backlog is caused because the operators have got the money to spend against the poor coal miners, and for the unions, and we do not have enough money to fight the corporations.

If what that responsible operator always does is protest everyone that comes down the pike, he protests the claims. That puts it back into the hopper and that takes time to refuel and time to go over and in the end, the people, a lot of them pass away before they can get their black lung.

I am a firm believer that this panel or this Government could and would bring out a system similar to the Social Security where you have not the responsible operator, but a solid fund set aside by the money coming from tonnage of coal to finance the program, we could eliminate the backlog completely, and it would benefit our people because they would not have to wait and they would not have to go back to hearing after hearing.

You win a case, the company appeals it, you have got to go back through the channels again. We are talking about mostly old, crippled people, and we are wearing them out, running them back and forth to doctors and from tests and clinics and what have you, and they wear these people completely out, and if you check the records, you will see a great majority of them pass away before they can get it, and I pointed out to you earlier that when the widow goes to get it, she does not get it automatically.

They look for loopholes to stop her from getting it. So, it is another hassle, and it is continually going on and it is getting worse and worse and worse down the line.

Chairman MURPHY. May I interrupt you and ask you a question. Is there any interest paid on the benefits when they finally accrue? Do any of you know? You know, if they go along 4, 5, 6 years and they are finally awarded benefits, is there any interest paid or do they just get their back benefits?

Mr. KELLY. A far as I know, and legal counsel is here with me, to my knowledge, there is no interest paid on back payments. They get paid whatever amount is coming to them with no interest. It really puts a hardship on the people, and, as you know, I am a coal miner by rights. I come out of the coal mines, and I know exactly what they go through, and the coal miner today, he gets the black lung, he is entitled to every damn penny he can get because of the grinding and greasing and conditions that he has to go through day in and day out to provide a living for his family.

I think it is completely wrong that the responsible operator would have the right to come in and because they have got the money, to be able to go out and buy Brother McCarroll—Brother McCarroll brought up about the B reader.

I specified that earlier. I know Dr. Walker's case specifically. In his last year, he was right here in Uniontown at the Fayette Bank Building, when United States Steel protested, said he was incompetent, said he could not remember any more, he was getting senile, and they protested that particular case, yet they won the case after he testified that it was only a short period of time that they disqualified Dr. Walker from being a B reader.

I do not go along with the B readers. I think the coal miner that puts time in that coal mine should be entitled to the benefits of the black lung because of the conditions that he had to work in.

I would ask this committee to do everything they can in my judgment to do away with the responsible operator but make them pay the pennies into the fund to keep it solid, and then we can get our benefits without fighting every Tom, Dick, and Harry for years and years.

Chairman MURPHY. Thank you, Mr. Kelly.

Do any of the other members have any questions?

Mr. GAYDOS. For the record, President Kelly, when in your opinion did the backlog start building up?

Mr. KELLY. When did it start building up? I would say probably it started in the last 8 years or so. It is just getting larger and larger and larger because of some of the things I just pointed out.

Mr. GAYDOS. Was there an acceleration the last 4 years, 5 years?

Mr. Kelly. Yes, sir.

Mr. Gaydos. Getting worse?

Mr. Kelly. Getting worse right up the line as we come in here today.

Mr. Sheinman. One of the things that has happened, at least around here, is there does not seem to be enough administrative law judges. They had some—at least in this area, they were not around for perhaps a year almost. I do not know the exact figure, but that is one of the things that has happened as well.

Chairman Murphy. Mr. Wise.

Mr. Wise. Either Mr. Kelly or the counsel—whomever—I would like to ask you two questions.

If I walk in your office and I worked 30 years in the mines, and I want to file for black lung, what advice would you give me as to how much time it is going to take before I can probably get those benefits?

Mr. McCarroll. We do not give you any time because it would be very foolish for us to tell you because it takes so long that if we told you, you would be so disgusted, you would just walk out without filing.

Mr. Wise. Well, what about just the initial determination?

Mr. Kelly. Let me answer your question more direct than what——

Mr. Wise. That sounded pretty direct.

Mr. Kelly. Well, I would say if I walked in the office today and filed for black lung, that is my initial visit, it would take anywhere from 3 to 4 to 5 years before I would finally get up to where I got to the final decision.

Mr. Wise. For the final decision. OK. Now, let us say that I applied, the initial determination is made, and now I am taking it to the administrative law judge. From the point where I appeal to the ALJ, how long would you tell me it would probably take? Two and a half years?

Mr. Kelly. I think I testified to that. Because of the backlog, it would take at least 5 years, according to the Labor Department figures, for you to get back up for a hearing.

Mr. Wise. Well, let me say that this is true in every district. I share a large number of coal miners with Congressman Rahall, too. Some 20,000, and we have had to tell them the same thing.

Mr. McCarroll. Congressman, to get back to your question, I think that if we would give more strength to the Labor Department, so they could come forward and say, yes, you have black lung, yes, you start paying, used to be that they had that kind of power, but, here, within the last couple of years, I do not know if it is because of the change in administration or not, now, the Labor Department is not giving these voluntary black lung and letting them go start collecting their pay clear up till the time that they have the administrative law judge hearing, and, then, here's another problem.

We give you black lung, Congressman, and now you are definite. Now, you go in front of one of the labor board and they say OK, we have looked it over, we sent you to clinics, you have got black lung, we are going to start paying you. Now, you go on and you go clear up to the administrative law judge, and then the law judge turns you down.

Now, you appeal. They stop your checks, while you are trying to get your case adjudicated. What right do they have to stop those checks until that complete adjudication of that case is done? That is wrong.

If there is an appeal, then we have a right to appeal and our checks to keep on coming until the appeal is over, because, Congressmen, the appeal is even longer than the case had to get up to the administrative law judge.

Mr. **Wise**. So, from the time that you walk into the office, work through the ALJ and to get to the appeals from the Review Board, you are saying it is 8 years?

Mr. **McCarroll**. Five to eight years.

Mr. **Wise**. Five to eight years. Thank you.

Mr. **Gaydos**. I would like to make a point right here.

Chairman **Murphy**. Yes, sir.

Mr. **Gaydos**. When we first passed this act, roughly 16 years ago, it worked.

Mr. **McCarroll**. Right.

Mr. **Gaydos**. You know the act worked, did it not? By the time we put in the machinery, it worked half decently. Now, I think as a matter of record, somebody has to make an attempt to identify most of the factors involved which now have created a situation where we have a 5 to 8 years backlog.

Why did it work the first 8 years and is not working the second 8 years? I think somebody has got to identify that and maybe give some attention to it.

Mr. **Sheinman**. I think somebody probably did, Congressman Gaydos. When it was originally made, the act provided for a fund and it was coming out of a fund, and then, once there was a reform act, then you started identifying the responsible operators, then the responsible operator feels he is going to be paying maybe $50,000 or $100,000 over a lifetime, so he can well afford to spend $5,000 to $10,000 to fight a nonpaid attorney and that—the litigation——

Mr. **Gaydos**. You fellows are experts at dealing with it, and that is your opinion, then, that is where the trouble started.

Mr. **McCarroll**. The trouble started with, they put that damn amendment in it in 1981, the amendment, Congressman.

Mr. **Gaydos**. The 1981 amendment.

Mr. **McCarroll**. That is what started our problems. That is when we started our backlog. Up until that time, hey, the administrative law judges came to Uniontown. They heard the cases. They heard maybe 10 to 15 cases at a time. Now, all at once, you cannot get three to five cases through over there in Pittsburgh in front of a law judge. They go in there and they start at 9 o'clock, and they hear a case, they break, they come back at dinnertime, they get one more case, and that is it.

Mr. **Gaydos**. Maybe their boss does not care, John.

Mr. **McCarroll**. You are one guy I can talk to because you were with us when we went to the Rose Garden to get this done.

Mr. **Gaydos**. I remember.

Mr. **McCarroll**. You were there, I was there, and Brother Boyle from the United Mine Workers, we were all in there to congratulate you guys because we had a good law. We do not have anything now, Congressman.

Mr. GAYDOS. And, on top of that, when I tried to sneak some roses out, the FBI got me, and I got in trouble.

Mr. MOLLOHAN. Mr. Chairman?

Chairman MURPHY. Yes?

Mr. MOLLOHAN. What percentage of cases that reach final disposition, are approved now?

Mr. SHEINMAN. Well, you see, before, there were more approvals. Now, the Department regulations have come in. The miner practically has to be—he does not have one foot in the grave——

Mr. MOLLOHAN. Well, do you have a percentage?

Mr. SHEINMAN. No. It was much higher before. In the——

Mr. MOLLOHAN. When did——

Mr. SHEINMAN. The cases that I tried about 2 years ago, I would say about maybe 60 percent won and there was a problem during appeals, and, now, it is quite different.

Mr. MOLLOHAN. So, when was that date? When did you—what date could you win approximately—before what date were you successful in approximately 60 percent of your cases?

Mr. SHEINMAN. Well, that was before the 1981 act. Before 1981. It was in 1980.

Mr. MOLLOHAN. And since the 1981 amendment?

Mr. SHEINMAN. Now, everyone that applies is being turned down because the regulations are so high and some of the things that the administrative agents are insisting on in the complex thing that we——

Mr. MOLLOHAN. Excuse me, sir. There has been a dramatic reduction in the approval rate. Not only has the length of time in getting the procedures all completed increased but there has been a dramatic reduction in the number of approvals since 1980 or since 1981.

Mr. SHEINMAN. Yes.

Mr. MOLLOHAN. Have there been changes in the criteria that is supposed to be considered to determine eligibility?

Mr. SHEINMAN. Yes. That is when the permanent regulations came in in, 1981.

Mr. MOLLOHAN. Would you tell the committee what those changes were?

Mr. SHEINMAN. Well, for example, they used to consider two pulmonary function studies, one was called FEV 1 and the name of the—these, for example, a man of about 5′10″ or 5′8″ had to have a 2.5, for example, or 2.6, on an FEV 1 and a MVV was about maybe 96 or below, that was approved.

Now, with the permanent regulations coming in, it is like 1.8. So,——

Mr. MOLLOHAN. So, those were standards that were developed by the agency. They were not a part of the statute, and you are suggesting that the permanent regulations made it much more difficult for a coal miner to be successful in processing black lung?

Mr. SHEINMAN. Congressman Mollohan, you have articulated it accurately.

Mr. MOLLOHAN. Thank you.

Chairman **Murphy**. Thank you. You have got some good constituents.

OK. Thank you very much, Mr. Kelly, and your witnesses.

We are going to move on to district—we have to get on. We have to get the District 5 people up here. We want to get them finished by noon. We are running behind.

Mr. **Kelly**. Thank you, Congressman, for having us here.

Chairman **Murphy**. Thank you. OK.

Mr. Redman?

[Pause.]

Chairman **Murphy**. Good morning, Mr. Redman. Will you identify the gentleman with you who is going to assist you in your testimony? And then you may proceed.

Don Redman, the president of District No. 5, United Mine Workers of America. Don?

STATEMENT OF DONALD REDMAN, PRESIDENT, UNITED MINE WORKERS, DISTRICT 5, BELLE VERNON, PA

Mr. **Redman**. Thank you, Mr. Chairman and members of your subcommittee.

On behalf of Richard L. Trumka, the president of the United Mine Workers of America, we want to welcome you to Uniontown, PA, especially your colleagues from district 5; my home district, district 2; also districts 31 and 17, United Mine Workers of America. ica.

We appreciate your coming to Uniontown. I would like to introduce international board members Jimmy Smith; on my right is our compensation director, district 5, Patsy Ricciuti; and to my extreme right is a member of the safety committee of Pittsburgh local, Ron Sicchitaro, who is also here to testify to some of the facts that we believe have led to the decline in benefits to our black lung recipients because the dust levels in the mine have decreased to the point there is no longer dust in the mines—which is totally false.

If you take the dust samples again and again and again, and if you do it right, you will get the right dust sample test to submit to the Department of Labor.

But, our purpose here, gentlemen, in appearing today is to bring your attention to the problems which face our miners who are ill and disabled from black lung.

These are the men who have spent many years at hard work in a hazardous industry. There can be no justifiable reason why these men must wait from 7 to 10 years from the time they file a claim until they receive a final determination, and why they must be subject to other hardships during the period when they are attempting to secure black lung benefits.

Speaking for the United Mine Workers of America, district 5, we would like to present the following testimony regarding what, in our judgment, are some of the shortcomings of the black lung program. This information is taken from our records and our personal experiences in handling black lung cases for district 5 during the last 4 years.

I must add when I was notified that there was going to be a subcommittee hearing on black lung in Uniontown, PA, I had reservations about testifying at this hearing. Subcommittee hearings usually mean reform.

In the back of our report that we submitted to this committee today, from 1972 to 1981, the reform of the black lung legislation has been deplorable to the United Mine Workers and all miners in this country.

The 1981 reform legislation act was the worst piece of legislation ever written in the history of the United States. It was written by the companies for the companies to deprive our people of their benefits. If you look at the chart—and these are the Federal black lung claims charts from the Department of Labor—that says in 1972 125,229 people filed for black lung benefits, about 50,000 people were approved. That is a percentage of 47 percent of the people were approved for those benefits.

In 1977, 307,440 people filed for the benefit, 119,177 people were approved, 188,259 people were denied, and that was 38 percent. Along comes the great reform of 1981. 36,909 people filed, 1,520 were approved, 29,725 were denied, 5,664 pending, for a grand total of 4 percent of the claims were approved after the great 1981 black lung reform law.

And, I think this answers the question that was asked of Jim Kelly and his attorney here, that I think that every time there is a reform in the black lung legislation, that reform hurts our miners, and I think the facts bear that out.

At this time, I would like to present Patsy Ricciuti, who is the compensation director of district 5. Patsy Ricciuti will read the rest of our testimony we have and will be here available for questions.

Thank you, Mr. Chairman.

Chairman MURPHY. Thank you.

STATEMENT OF PATSY RICCIUTE, COMPENSATION DIRECTOR, UNITED MINE WORKERS, DISTRICT 5, BELLE VERNON, PA

Mr. RICCIUTI. Mr. Chairman, we have been talking about why the delays, why it takes so long. During the rest of this paper, I want to take you along the path of what happens in district 5. We are more familiar with that than any of the other areas that we handle, and if you follow us closely, you will get the numbers, you will get the reasons, and you will get to know why the delays are taking so long.

During the period from December 1984 until April of 1985, which is just past, approximately 50 to 60 cases were scheduled for hearings. The administrative law judge riding the circuits in the summer, no hearings were held on cases with our office from July to November 1984 inclusive.

Many of the claims which came up for hearings were filed in 1977 and 1978. Now, if you had been originally filed in 1975 and 1976, so you are looking at a 10-year backlog there at least as a minimum of cases that were finally coming up for decision.

At this time, the main backlog is in the scheduling of cases for hearings and decisions at the Benefits Review Board. This snag is not due solely to the Office of the Administrative Law Judges, but is due in part to the delay in the Office of Workmen's Compensation Programs in sending the cases out to be assigned for hearing. The delay in the Office of Workmen's Compensation Program has now been reduced to 6 months to 1 year from the date of filing which is some improvement. Not a major one, but it is some improvement.

It now takes approximately 1½ to 2 years after the claim is sent to the Office of Administrative Law Judges to be scheduled for a hearing for the hearing to take place. The file is sent from the OWCP district office to the OALJ in Washington, DC.

From there, it is sent to the regional or local office where the hearing is scheduled. It is not known for what purpose the claim is sent to the central OALJ office before being sent to the local or regional office. Perhaps some of the delay could be eliminated if the file were to be sent directly from the regional office to the local or regional OALJ's office.

It is also believed that inadequate staffing of the local Office of the Administrative Law Judges is also responsible for the delay in scheduling of the cases for hearing and in issuing decisions. The decision, in most cases, depending on the backlog of the individual ALJ, may not be issued for almost one year after the hearing.

In essence, at this time, the litigation process of the Federal claim takes from 7 to 10 years. Frequently, it is necessary for the miner to undergo repeated disability examinations because the evidence contained in his file is too old by the time the claim comes up for hearing to be used.

In death claims, obtaining the testimony of lay witnesses regarding the deceased miner's ability to perform his last job is severely hampered as the deceased miner's coworkers have died or the family is no longer aware of who worked with the miner.

The delay in litigation has severely intensified the problems which occur in cases of overpayment where the claim was originally approved for payment in the early stages and denied by the administrative law judge. I think district 4 touched on that lightly about overpayments, reimbursement cases.

Frequently, the amount of overpayment exceeds $10,000 with many cases involving $20 to $30,000 in overpayments. The main problem in the DOL procedures for collecting overpayments is its emphatic refusal to schedule cases for hearing regarding waiver of repayment.

The DOL contends that its informal conference constitutes the full, fair and impartial hearing required. However, at one time, the claims examiner who handled these conferences was instructed to forward all cases to the General Attorney for collection. Although our office is unaware of any collection efforts by the GAO, few, if any, waivers have been granted on underpayments, suggesting that no change in the DOL policies have occurred.

Presently, it takes approximately 2½ to 3 years for a decision to be obtained from an appeal to the Benefits Review Board. Again, staffing is believed to play a role in this delay.

The appeals themselves are adversely affected by the span of time between the submission of briefs and the consideration of the appeal by the Board as the law upon which the appeal is based has been changed, which naturally affects the outcome of the appeal.

The DOL continues to request repayment of overpayments, even though the case has been appealed, and I guess District 4 testified on that also. If your case is up before the BRB, they want the payment right then and there whether the decision is favorable or not.

Frequently, it is necessary to go to the Benefits Review Board to obtain an order directing the Office of Workmen's Compensation Programs to cease collection efforts until a decision on the appeal is issued. Naturally, the long appeal process adversely affects those who had become dependent on the benefits and were denied by the ALJ.

Payment of benefits ceases with the ALJ denial.

To summarize, the elimination of the long delays in proceeding with black lung claims and appeals is the one single improvement which the Federal Government should undertake. The litigation process of the Federal claim requires that both the claimant and the employer be given the opportunity to develop medical evidence regarding the claim. Therefore, we recommend that the goal for an effective litigation process be set at 18 months from the date of filing to the issuing of a decision.

We felt that that was adequate time for both the responsible operators to get the medical, as well as what evidence we had to submit. We felt that 18 months was sufficient time to get a decision from the people.

In conclusion, and Don hit on this, one other fact we would like to bring to your attention is the adverse affect that reforms in the Federal black lung law have had on claims for black lung benefits.

Please note the attached information on the charts on the back. Don said it best when he said please, no more reforms. No more reforms.

Thank you.

[The reference material follows:]

FEDERAL BLACK LUNG PAYMENTS UNDER SSA

	Miners	Widows	Dependents	Total
Pennsylvania	26,550	43,977	25,215	95,656
West Virginia	18,189	21,912	19,951	60,052
Kentucky	12,445	13,750	14,643	40,829

Number of persons receiving federal black lung payments from the Social Security Administration in 1983.

Source: Social Security Admininstration

FEDERAL BLACK LUNG CLAIMS

	Filed	Approved	Denied	Pending
1972 reforms	125,229	60,083		
1977 reforms	307,440	119,171	188,269	
1981 reforms	36,909	1,520	29,725	5,664
Total	467,695	243,354	218,652	5,689
Medical benefits	117,263	116,580	658	25

Status of initial black lung claims filed with the U.S. Department of Labor from 1973 to Feb. 15, 1985.

Source: Division of Coal Mine Workers' Compensation, U.S. Department of Labor.

STATE BLACK LUNG BENEFITS

	Recipients	Expenditures
1971-72	6,872	$14,157,000
1975-76	8,750	16,866,000
1978-79	7,117	12,313,000
1980-81	3,893	9,948,000
1981-82	3,653	6,323,000
1982-83	3,530	6,487,000
1983-84	3,407	6,551,000

Estimated number of persons receiving black lung payments under the occupations disease program of the state Bureau of Workers' Compensation.

Source: State Bureau of Workers' Compensation.

Chairman **Murphy**. Thank you very much.

Maybe we will not call it reform, but I certainly think we need a change.

Mr. Petri?

Mr. **Petri**. Thank you very much for your testimony.

At the beginning, you referred to current substandards in the language, but did not offer any testimony on that, and I wonder if they are adequate or if the miners of today are going to be the black lung claimants of tomorrow.

Mr. **Redman**. Well, I think we have what I feel is an expert. We have a rank and file committeeman who works on a long wall. As you are well aware, the long wall is the future of mining. But, the jury is still out on the long wall mining. The jury is still out on it.

Fifteen years from now will tell us what the verdict was on long wall mining. I think at this time Ron Sicchitaro, who is a rank and file miner, who is somebody who works on the long wall on a day-to-day basis, I think should give testimony and will give testimony as to this at this time.

Ron.

STATEMENT OF RON SICCHITARO, MEMBER, SAFETY COMMITTEE, PITTSBURGH LOCAL, UNITED MINE WORKERS

Mr. **Sicchitaro**. Mr. Chairman, my name is Ron Sicchitaro. I work for Beth Energies. I have worked there for 10½ years. I am a coal miner.

Of those 10 years, approximately 9 of those years I worked on a long wall, which is more sophisticated than a conventional mining system. The long wall is the wave of the future.

If a mine is going to be viable in the market, it must have a long wall because of the high production ratio. The trouble with the long wall is it puts out a lot of coal. When you put out a lot of coal, you put out a lot of dust, and that is what a coal mine is, a hole in the ground.

One way in and there is another way out. Only the air escapes. The dust settles down. The coal mine is not black, it is white. You stay covered with all this coal dust and rock dust. They cover this dust with another dust to another material so that it explodes.

I went to a symposium in West Virginia, and I would like to read it to you. Dust generation is inherent in all mining operations. Dust is principally generating coal extraction during breaking of the coal out of the seam and during root bolting. Workers are also subjected to secondary dust from additional operations.

Once this dust becomes airborne and free to migrate, the control becomes very difficult. Coal mine is a dusty place. Anybody who tells you that it isn't is foolish and has never been in a coal mine.

Dr. James Richards, at the same symposium, I would like to read his comments about long wall mining. About a third of all measurements taken on long wall sections were above the 2-milligram standard, a higher percentage than that for any other mine method, and more than twice that in continuous mining operations.

They have a standard of 2-milligrams that you can meter. It used to be 3, now they have reduced it to 2. But, the long walls, they are always out of compliance, or most of the time, they are out of compliance. 75 to 95 percent.

In our operation, like I said, I was the Chairman of the safety committee. We took the Mine Health and Safety Valve Association to court because of Federal discrimination. We said they were making our men work in an unsafe condition with all this dust. We went to court. They played a game with us, the Federal officials, and the company.

When they are out of compliance, they come down, they find out we are getting 6-milligrams instead of the standard of 2. They do not cease operations. They turn a little nozzle on the spray to the left and that will give them an abatement, and then they will have to go through another procedure for 3 more months. We are in and out of compliance, mostly out of compliance, and we get no help from the Federal people, we get no help from the State people. We are the people who are eating the dust. We are breathing that dust.

Also, I was just explaining the operations where coal is produced. Like I said before, the dust is inherent in the air. It is always moving. There is always a movement of air blowing the dust in the air.

Now, with any of the black lung, it is not the dust that you can see, it is the finer particles. You cannot see them, but they are always present. If you are on the ground for 8 hours, you were breathing those particles for 8 hours. The stuff is there.

Our Federal Government, they measured this dust on our people, but the system is so ripe with tampering, it is unbelievable. They give our little man—excuse me. They give our men monitors to measure the dust, but these monitors, they have to switch on, you can just flip it off when you want to, or there is a little screw adjustment. You can turn down the volume and see the air going through this machine. It can be tampered with.

Also, when something is being done for our people, the operators—I have seen it done. I have seen it, I have heard it. They tell people you do not want to wear this thing tomorrow, do you? If you bring in a good shuffle today, which means below the standard, you will not be penalizing for carrying these samples tomorrow. Also, the sheer operators, the man who runs the long wall machine, which is the dustiest occupation, they will let him run for maybe 20 minutes that day. They say fine, you go to dinner and take it easy, just so the guy without the monitor will run the rest of the day.

That is what is happening, you know. Also, the company counsels the miners. That is ridiculous. They are sampling themselves, more or less, and I do not think they are going to spill the beans on themselves.

You know, the dust is there. It is ludicrous to believe that it is not, and in the future, with the new technique, such as long wall mining, I believe we are going to have a higher incident of applicants. The mines are getting dustier, not dryer.

Thank you.

Chairman MURPHY. Thank you.

Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman.

Much of the research on coal mine health and safety technology, as it relates to the reduction of dust levels in our mines, is done through the Bureau of Mines.

The administration has proposed to cut those research moneys by more than 30 percent in this year's budget, and from what I gather from your testimony, you are saying that the dust levels have not been improving over recent years, but, as you just concluded, they are getting greater.

Mr. SICCHITARO. Yes, sir.

Mr. RAHALL. Would it appear then that this Administration proposal does not make sense? This proposal to reduce by more than 30 percent the funding for coal research, health and safety technology, which includes the respiratoral dust research center in Morgantown at West Virginia University and at Penn State University, which are targets for complete elimination in the administration's budget?

Mr. SICCHITARO. Well, as I stated, sir, dust is there, and it is not getting any better. I believe that the closing of these centers is foolish. I believe we need more research instead of less.

We need more protection. Our people—they are getting black lung. We need protection from it, we do not need our funds cut to allow the companies to run rampant.

Mr. RAHALL. This comes under the jurisdiction of the Mining and Natural Resources subcommittee of the Interior Committee, and Congressmen Murphy and Mollohan and myself serve on that subcommittee.

We have made a recommendation and are trying, through the budget process, to put the money back in for both those centers here in Pennsylvania and at West Virginia University.

Mr. REDMAN. Thank you very much.

I think it is very important, as I stated before, in all the reports and all the research done, very little is pertaining to the long wall mining. The verdict is still out on long wall mining.

I would say in the next 15 years, it will have our toll, the same as it was from hand loading to conventional mining. I think I should say, Mr. Chairman, if I may, the importance is no more reform, but changes. Our people are entitled to these benefits, and they are entitled to these benefits because as Congressman Gaydos said, 16 years ago, when you looked at this problem, you wrote the law for the people that had suffered at the hands of the companies for not providing them with a safe, healthful working place, that they would receive benefits.

Now, through the reform laws, it is almost impossible. Four percent in 1984. Four percent of the people received the benefits, and I believe, and as our report said, that they are short staffed, but I truly believe that there is a waiting game.

If you wait long enough, if you cause them enough heartache and agony, they are going to die. They are going to die. They will not be a burden because when the companies became the payees, gentlemen, they became the sayees, and, right now, we are at the sole discretion of the corporations and the companies, and that is the gospel truth because in the back of our report, 4 percent in 1984, that is fact.

Chairman MURPHY. Mr. Staggers?

Mr. RAHALL. Will the gentleman yield just a moment?

Mr. STAGGERS. Yes.

Mr. RAHALL. There is also another Member who is with us here today and who is on that subcommittee of the Interior Committee, and that is Congressman Mollohan, who has introduced legislation that would ensure that a great deal of this research that is being done on dust levels and on coal mining technology and other aspects of coal mine research would actually be applied; would get down to the level of where it would be put into use on a daily basis.

Much of the research that is being done today sits on a shelf in Washington and does not get actually applied in our Nation's coal mines, and his legislation would be an effort to actually see that research applied.

So, while what you are pointing out in your figures is very accurate, we have to also ensure through the research process, through the R&D money, that we do not allow even further devastation to take place.

Thank you.

Mr. RICCIUTI. Mr. Congressman, one point I would like to make before you go any further, when you start to go back and you start to look at the research moneys and other money that is going to be made available to this program, please take into consideration that at this point in time, people applying for black lung probably started in the mines in the forties, when they hand loaded. They switched to conventional mining, consequently they were able to work up to the age of 60 to 62 years old before they really became afflicted with the disease.

With long wall mining, you may cut that down to 10 years of active employment by a miner, and I can give you an illustration of our mine, one of the fellows that was working on a long wall. After 3 years, he contracted chronic obstructive lung disease.

You know what the company did? Put him on salary. Took him out of the union and put him on salary. Very, very neat. OK. But, this is what is going to happen. They will be looking at guys 60 to 65 years old applying for Federal black lung. You had better start including the modern mining techniques and high dust concentrations in the mines, that these guys are going to be disabled a lot sooner, and if you are looking at what, $490 some a month, the benefits now, which are inadequate for a man that is 35 to 40, possibly a family to support, you had better be looking at a whole ball of wax when you talk about making adjustments and change there. I mean, because that is coming.

Every major corporation around here has long wall mining because it is economically fair, it is a high production method. The hell with the guy, get the coal out. That is it.

Chairman **Murphy**. Mr. Staggers?

Mr. **Mollohan**. Along those lines, I had another thought I wanted to discuss.

Are you suggesting that we look at some sort of controls on the long wall mining? This is another general problem, the subsidience problem with the long wall. I know we are facing it in my county in West Virginia.

Mr. **Redman**. I think that long wall mining is the mining of the future. I do not think we can deny that. I think that to stay competitive within the industry, we must have long wall mining.

I think that there has to be a regulation set forth on the long wall mining that still keeps us competitive and it keeps us mining coal safely.

The question was brought up about cutting the research and cutting the inspectors, in the Reagan administration, and I think the people are well aware of the record, the number of people killed in the mining industry in 1984.

In 1984, we killed more people in the mining industry than they did in the steel industry, the auto steel industry, combined, in the last 30 years. So, any time we get a reduction in the inspectors or in research, the people that will pay the price is the active miners. The same as the pensioners who are applying for the black lung benefits are now paying the price of the reform and the black lung legislation.

Mr. **Mollohan**. My second thought, after looking at your charts, Mr. Redman, concerned the form and what effect that has had on the recipients. I can see where you would be leery of any type of reform.

Earlier today we heard a few good suggestions for reform, including, for instance, eliminating the necessity for finding the responsible operator before benefits would go out.

The other one was eliminating the determination of the responsible operator and having some sort of Social Security type of concept.

The third one was the widows who received it, having to prove it again. Those are three suggestions I would like to get your comments on.

Mr. **Redman**. I think an improvement in all three is similar to what we had prior to the 1972 reform and especially prior to 1978. I think that we did work under that concept, and also had what we called the consumption ruling. That is, it was believed that if you worked 25 years in or about the mines, you had black lung and you were permanently and totally disabled.

I believe that. I believe that any miner that worked 20 to 25 years in a mine is totally disabled and has a right to receive those benefits, and I think that was the purpose why the law was written to start with.

Mr. **Mollohan**. Thank you. Thank you, Mr. Chairman.

Chairman **Murphy**. Mr. Wise?

Mr. WISE. Following up on that, you are saying that you think long wall mining is going to hasten the onset of black lung in miners. I would appreciate somebody reacting to that statement.

It seems to me that those presumptions that you were talking about, Mr. Redman, were effectively knocked out, and that the thrust of the law is going the other way from what you are saying. It is going to get harder and harder to recognize, in the law, the onset of black lung at an earlier age with less work experience, is that true?

Mr. REDMAN. Certainly. That is why I said no more reform, we need changes. We need to get back to the basics of what the law meant to say to start with, and, as I stated, I think, two different times, the verdict is out. It is going to get very interesting, and I have not seen any research done as to date pertaining only to long wall sections of the mine, pertaining to the whole mine, pertaining to the long wall mining sections, also to the conventional mining sections of that mine.

I have seen no information, no research, on the long wall mining and pertaining to the long wall miners themselves.

Mr. WISE. Following up on what Congressman Staggers was talking about, and following up on suggestions in your statement, it is clear that running throughout is the thread of administrative delays.

Could part of that problem be addressed significantly by simply giving the Department of Labor one mandate to dispose of every claim in a certain amount of time. Also, is there a genuine staffing problem, in your opinion, and there are simply not enough people to handle the cases?

Mr. REDMAN. Absolutely, and I think that is twofold. I think there is a reason for that. I think that there is a reason why they are understaffed, as I stated, because eventually they will not be here, and I actually truly believe that.

Mr. WISE. But, then, let me ask you from your experience, where are the staffing problems? Is it at the claims examiner level? Is it the clerical level in the district offices? Is it the ALJ's or is it——

Mr. REDMAN. I think it goes to all levels, and I think that the attorneys, and I think that district 4 testified that it is at all levels, because I think Patsy can attest to this better than myself, because it is a controversy, but you get the shuffles from one place to the other, and when you are talking about 7 to 10 years to get a determination on a case from start to finish, it is totally uncalled for. Is that correct, Patsy?

Mr. RICCIUTI. Yes, I think I touched on it in our letter. When you are sent to a hearing at your regional office, and we have two regional offices here, one is in Johnstown and one is in Greensboro, if those offices would be given more authority to make decisions, to set the hearings up and whatever, rather than sending them to Washington, DC, and Washington, DC, coming back to the regional office, regional ALJ, that would cut down a lot of the time.

But, if you mandate the Department of Labor to say, hey, this applicant applied today, we have got 18 months to get him down to a decision, one way or the other, the operator would have that much time to get his information in against him.

But, basically, the problem started when you reformed the disability fund, you put the company—right in the company's lap. That is when they come out with the high price lawyers, the high price doctors, out in West Virginia. They literally slaughtered our people. The most pathetic thing you want to see is a 75-year-old man going to a pulmonary function test. You want to cry because it is hard enough for a younger fellow to do it, let alone an older fellow.

He has to do that sometimes two and three times, and then if the case is 4 to 5 years before he gets to the decision on it, he has to update his medical information and get that test again. It is murder for those gentlemen, and they should not be put through that. It is done deliberately.

Mr. **Redman.** Pretty soon they will not be here. Pretty soon, they get discouraged. It is hard. You either die or you quit, and that is what you are hoping for. And, if you believe anything else, you are wrong. That is the truth. That is the gospel truth, and then you got the fact that only 4 percent of the people are going to be awarded it anyway.

Mr. **Ricciuti.** You know, that is one recommendation that I would like to also throw up to you guys. It sounds a little corny, but if they are so understaffed and overworked, I am not familiar with the State of West Virginia, but I am familiar with Pennsylvania. We have an excellent staff working compensation referees. We could probably help them lighten that load. You know, I mean, if you are overworked, hell, let us give the work to somebody else. And, all we have is the duplication of services anyway.

The State people do exactly what the Federal people do, you know. So, if they are so overstaffed and overworked and Reagan does not want to put anybody on the payroll, hell, let our people handle it. We will find people to do it.

Mr. **Mollohan.** Mr. Chairman, that is a good idea. It also tracks the information we got in our letter from Ford B. Ford that suggests that the GS-16 judges that are handling nonblack-lung cases cannot spend a significant amount of time or—I'm sorry. This mike is out.

I was simply making the point, Mr. Chairman, that what he is saying about manpower and whether we are short of manpower tracks what information we got back in our letter to Under Secretary Ford. We have, I think, 60 GS-16 administrative law judges that are handling a light caseload, but they cannot deal with black lung cases because if they do, they will be reduced to the 15 administrative law judges, and that is something that we ought to be able to address very quickly and get more manpower.

Chairman **Murphy.** OK. If we have no further questions or comments, I am going to give my colleagues—yes?

Mr. **Smith.** Just a few comments. We in district 5, I am Jim Smith, international board member, we would like to offer an invitation to the panel that any time they want to see one of the mines, just go over to district 5 and—what you must realize is that when you come to a mine and the mines that we take you to, we must receive permission from the company that you are going to explore the mine.

When you do make a visit, you are not going to see the coal mine as it functions; you are going to see a—sort of a Disney World type affair because the place is going to be prepared that you are going to.

So, you have to just take the adverse conditions and, if possible, just the slight suggestion like let us go to one of the other sections when you come and you will be surprised, just like night and day.

I was out at a mine for 7 months and did not get a chance to go back in and visit the section. I went in to one of the sections out at Matthies Mine, which Congressman Murphy's son worked at, and we toured one of the mines. When I came outside, it took me about 4 hours to clear my throat, just from the black lung and the dust.

This is what I want you to experience. When you get back out, you can talk to your colleagues and say you know, I went in a coal mine, not say I toured Matthies Mines or I toured Beth Energy Mine. I want you to say I was in a coal mine.

I have seen a roof fall. I seen all the conditions as they exist where individuals do work. I am sure Congressman Murphy has seen that. His son was injured in the mines. He has experienced all the trauma that goes through the mining industry, and I wish you all could do that because I am sure you would be sympathetic to our cause.

Chairman MURPHY. Thank you, Jim.

Mr. Gaydos.

Mr. GAYDOS. Yes. It is a very short statement, and I think I am going to depend upon you and ask you to make a formal complaint to our office. I am serving as the chairman of the Subcommittee on Health and Safety, and I can tell you we are going through hearings right now on some other matters. I do not have a formal complaint, a count, a dust count at the face on the long wall that is inherently dangerous, a complaint that there is improper monitoring.

I do not have that. So, I am going to ask you now to make that available to me and we are going to take a look at it. We will do something about—try to do something about it. I do not have that in front of me. I wonder where it is. Whether it got lost or—I am surprised that I have to come here to Uniontown, honestly, to find out that that is occurring.

I am chagrined and shocked because I thought the long wall was the answer. I really did, and this is the first I heard it.

Mr. REDMAN. With due respect to you, Congressman, as I said, I have not seen any research, any reports. The long wall mining is the mining of the future. It is the most secretive mining.

I am sure that in the report, when you get a citation and you evade that citation and then you give a variance, that is not really a citation that you are cited for. That is a noncitation. It is not something that somebody is fined with the S&M citation.

They keep abating them. There is no way they can stay within the 2 milligrams ever. We have had meetings after meetings with management pertaining to the dust levels. I will gladly provide you the information we have available at our office, the copies of the citations we get, but it is a very secretive operation in the long wall mining, and, believe me, when I say the verdict is out, I mean that, and I think some research needs to be done on the long wall mining.

Mr. GAYDOS. Well, without exaggerating or elongating this particular segment of Mr. Murphy's hearing, you and I have got to get together and we will get together.

Mr. REDMAN. I would appreciate that opportunity.

Chairman MURPHY. I am on that subcommittee, too. So, get that information to us.

Mr. REDMAN. I want to thank you again. It has been an honor, really an honor for us in district 5, and I know for the people here today to have the opportunity to present our testimony to you Congressmen, and all I can say to you, please help us, we need it and we need it bad. Thank you.

Chairman MURPHY. Thank you very, very much.

As I mentioned a minute or so ago, I am going to give my colleagues a 25-minute break to stretch their legs, call their home district offices and make arrangements for their transportation, and we will reconvene at about 1:00 to 1:10.

[Recess.]

Chairman MURPHY. The hearing will reconvene.

We will now hear from Kenneth Yablonski, an attorney.

STATEMENT OF KENNETH YABLONSKI, ATTORNEY, WASHINGTON, PA

Mr. YABLONSKI. My name is Kenneth J. Yablonski, and I am the senior partner in the law firm of Yablonski, Costello & Leckie of Washington, Pennsylvania. My law firm and I have been representing disabled coal miners since 1960, 9 years before the first Federal legislation was enacted.

I have previously testified before subcommittees of both the House of Representatives and the Senate in support of liberal amendments to the original act and its amendments.

Federal Black Lung Act has had a tortured history of how it has treated the victims of coal workers' pneumoconiosis since its inception in 1969. While the act has always claimed as its purpose to compensate victims of black lung disability, the means by which it has determined the existence of coal workers' pneumoconiosis and eligibility under the program has been in constant flux, sometimes using liberal standards and other times not.

With the passage of the 1981 amendments, we have seen a drastic shift away from the original humanitarian intent of the law toward strict restrictive standards of eligibility. As a result, substantial numbers of claimants who would have qualified under the pre-1981 amendments are now being denied compensation. Many of these claimants are suffering substantial pulmonary impairments but are unable to prove the causal link between their disease and their coal mine employment.

Others suffer from the law's efforts to reduce the claims adjudication process to a numerical formula whereby those persons with certain pulmonary function study values are eligible while those with nonqualifying values have practically no chance for eligibility, notwithstanding the fact that their treating physicians and other medical evidence does support disability as a result of coal mine employment.

The fallacy of this approach, the attempt to try to make pulmonary function studies a mathematical certainty in determining disability and eliminating the physician role in diagnosing disability as a result of the pulmonary problem is at the very heart of the problem, and I guess it is human nature. We all grew up understanding that 1 plus 1 is 2, 2 plus 2 is 4, and if somebody can come up with a formula that says if you have 0.21, you are disabled and if you have 0.25, you are not disabled. That sounds nice and easy, and it is easy to understand how someone might want to accept that.

However, it ignores some rather obvious facts. First of all, it ignores the fact that there are a considerable number of physicians in the medical profession that do not accept the PFS as a standard for disability. They will say that if the pulmonary function study supports my conclusion, that the man is disabled from a lung condition, I will accept it. If they do not support that conclusion, I will throw out the test because I know the test findings are not as good as my observation of the total man.

Second, the tests do not take into consideration the fact that a coal miner being involved in a heavy exertional occupation is, in essence, a pulmonary athlete. He probably has better lung capacity at his most productive years than the average professional athlete, and no one measured him when he was at that stage.

They only started measuring him when he was 60 years or 65 years old, and they are comparing those studies to the norm that was obtained by people that they took in a category out in the salt flats of Utah who had no problems, who never saw the inside of a coal mine, and they are saying well, we are going to compare this man to them.

We have seen in our office many instances where a man systematically drops from the time that he was first measured to 4 years later. Lord only knows what his standard is now compared to what it was when he was 35 years old at the peak of his mining career, and that, in my opinion, is the basic fallacy why the pulmonary function study can never be the alpha and omega of determining disability. You have to permit the doctor, the man who has seen the coal miner, from youth to old age, you have to let him inject—not the science, but the art of diagnosing disability, putting everything together.

Any medical text you read on diagnosis of disability of coal workers' pneumoconiosis says you must have a history of complaint, shortness of breath. You must have a history of exposure in the mines. You must have a physical examination. You must have some other objective evidence, x ray and PFS, and then you put it all together and you make a determination.

You cannot award disability on the basis of any one of these criterion. To deny a man disability on the basis of saying that he does not meet pulmonary standards is just as bad as what the conservatives ardently strive against in a presumption of disability after 20 years. They oppose any presumption of disability while supporting a known defective test to deny eligibility.

Additionally, the 1981 amendments eliminated the presumption whereby a miner could show that if he was suffering from a totally disabling respiratory disease, the disease was presumed to be pneumoconiosis. This presumption was placed into law in 1973, to assist miners in proving their claims in recognition of the fact that medical science was not sophisticated enough to distinguish between two or more possible etiologies.

When the 1981 amendments were passed, medical science had not developed any greater sophistication nor any greater capability in this area. The simple fact of the matter is that the coal industry and the concerned conservatives of this country were able to ram through the 1981 amendments. There is no medically sound support for eliminating that presumption.

Test after test, by Dr. Noyae in Hershey, PA and other areas, have established consistently that they find more pneumoconiosis on autopsies than is diagnosed on x ray. This can only mean one thing, I do not care how you look at it. It means that we are not seeing the pneumoconiosis on x ray and it is there.

I heard some talk this morning about B readers. The B reader, I will belabor the point, if I may. You can become an A reader simply by going to a 1-day seminar. You can become a B reader by going to a seminar and passing a test. You do not have to be a radiologist. As a matter of fact, when I was preparing for the cross-examination of Dr. Keith Morgan, who, for a period of time, was chief advocate of the coal industry, we discovered in the old NIOSH records, a conversation that took place in one of their committee meetings, and someone said well, if the B readers are supposed to be as good as we think they are, how do you explain that one of our computer programmers passed the B reader test.

Not a doctor, not a radiologist, a computer programmer. He passed the test. He snuck in there, took the test, and then he came back and showed them. He could be a B reader. I suggest that this would indicate to me that the B readers are not the alpha and omega of x-ray determination.

But, more importantly, it indicates that there can be no logical reason for eliminating the presumption that existed prior to 1981. The diagnosis of pneumoconiosis, and we get to the very conservative or the liberal point of view. If you believe that the coal macule is the only effect that coal dust has on the lungs and you want to argue that you are not going to compensate for anything other than that which the coal macule caused, you can accept what the conservative element of the medical profession says but you ignore the large majority of the medical profession which says coal dust not only causes coal macules, but it causes bronchitis, causes early air-way obstruction, and many things that are very difficult to diagnose.

The presumption that existed prior to 1981 recognized that if you had a coal miner who was disabled from a lung disease and had *x* number of years in the mines, it was presumed that it was caused by his exposure. In many instances, they were not cigarette smokers, there was no other cause discernible. I suggest that medical science that cannot really tell us the cause of the common cold has not reached the point of sophistication the 1981 amendments project.

The Federal Black Lung System in 1985, in my opinion, shows no improvement from the claimant's standpoint over the system at the end of 1980. Instead, all trends are unfavorable. The delay in getting cases from the Deputy Commission or level to the Office of Administrative Law Judges for formal hearing is just as long as it ever was.

Moreover, there is no logical order in the manner in which cases are selected for referral to the Office of the Administrative Law Judges. We see cases filed last year being noticed for formal hearing this year while cases where a formal hearing was requested in 1978, still languish at the Deputy Commissioner level, despite efforts to get them moving.

Medical benefit only cases, where monthly compensation is not being challenged, are occupying a substantial portion of the formal hearing dockets, while claims for monthly benefits sit waiting indefinitely for trial dates. This fact is particularly upsetting to claimants and their representatives, and I suggest that it does not really make any difference in the history of man who is going to pay for the medical benefits of a person who has already been determined to be disabled.

I suggest we can wait on that for 5 or 6 years. But whether a man who is waiting for a determination, whether he gets benefits or not is what is really important as far as this act is concerned, and I say it is absolutely improper, and inhuman, to process these medical benefits claims while delaying the tremendous backlog of monthly benefit claims.

Another aspect is the problem in delay of the Black Lung Program centers on the appeals from the Office of the Administrative Law Judges to the Benefits Review Board. We have cases appealed to the Benefits Review Board 3 years ago which still have not been decided. For claimants who waited several years, just to have their cases tried, at ~~the~~ administrative law judge level, after winning they may still have to wait years before they know whether they can spend the Federal benefits the administrative law judge has awarded. All too often, the claimant is dead before the outcome is known.

And, again, I suggest that there is selectivity in the manner in which cases are being decided at the BRB level. Let me give you an example. At one time, the regulations provided that the Department of Labor was not permitted to use x-ray rereads in the determination process. Our office, at that time we were representing the United Mine Workers District 5 Compensation Department, established a series of inquiries with the Department of Labor as to why they were ignoring their own regulations and were continuing to obtain rereads and use them in determining process.

They brushed us off with absolutely no response, no justification for violating their own act and their own regulations. We went into district court in the Western District of Pennsylvania and obtained a temporary restraining order against the Department of Labor preventing them from doing this, and that is when everything hit the fan. They called us down to Washington, DC, and told us how we were interfering with the adjudication process, how it was going to cause delay, how everything was going to go wrong because we were insisting that the Department of Labor follow its own regulations.

Ironically, before the final hearing on that injunction could take place, the Benefits Review Board decided the case which involved our office, that involved this very question, concerning the rereading and the determination process. The BRB ruled that the Department of Labor should not do it, sent the case back and the Department of Labor said, now, we are not going to permit rereads.

I cannot believe that Tobias came up chronologically. I have got to believe there was selective handling of an appeal to get us off their backs, and I suggest that this happens too often in the administration of this act.

Another inequity borne out of the 1981 amendments, which has been a major source of resentment involves cases, which were approved by the Department of Labor at the Deputy Commissioner level prior to January 1981, and were being controverted by the coal companies.

The 1981 amendments dismissed the coal companies in many of those cases and substituted the Department of Labor as a liable party in interest. When this happened, the Department of Labor in many instances, reversed its position of eligibility and challenged the claim, thereby taking up the defense formerly held by the coal companies.

This flip-flopping should be stopped. If a man was eligible at one time under the Department of Labor, because they now have to pay the bill, there should not be any change in their position as to eligibility.

In summary, the 1981 amendments, in our opinion, were a boom to private industry in drastically reducing its liability in present and future black lung claims. This was achieved mainly by eliminating the important presumptions governing medical evidence and causation. On the other hand, the amendments did nothing but hurt claimants filing post-1980 claims. Indeed, it failed to assist a large class of claimants whose cases were pending at the time of the amendments by failing to provide any redress of the system which accounts for the great delay in the adjudication process.

From our point of view, if you could be successful in getting back to the pre-1981 standards, it would be a significant step in the right direction.

More so, if you want to eliminate the total problem and I realize that your job is probably a lot harder now than it was before. When you talk about delays and costs I cannot think of anything that is more humiliating and more disgraceful than to take a 65 year old former coal miner who now comes before the Government and says, I am short of breath, I cannot work anymore, I cannot do the things that other 65-year-olds can do. This is the same man, look at his age category, who fought in our wars, who paid his taxes, who raised his family, who worked in the most hazardous industry in the world, who now has his family doctor who has treated him throughout his life, telling him that you are not the man you used to be. With all of this the cost industry medical experts and lawyers and oftentimes the U.S. Government treats him like someone who is lying to get something he is not entitled to.

I think it is humiliating and disgraceful, and I think that this battle between the conservatives and the liberal elements of the medical community—and the battle between the lawyers representing coal companies and the lawyers representing the claimants, should be eliminated.

I think that there should be established a presumption.

Let us not talk about it being a presumption of disability. Let us talk about it being a presumption of eligibility. Any man that goes into the mines for 30 years, everybody agrees, even the most conservative persons, that there is coal dust in his lungs. Let us pay him for the coal dust in his lungs.

God only knows, I would not want it. You would not want it. The doctors, who say it does not hurt him, do not want it. So, if he is going to have that coal dust, let us not worry about how disabling it is or how much of a problem it is going to be. Those of us who believe that it is a great problem will be satisfied. Those who do not believe it is a great problem will have to recognize it is there.

Fix a fair amount of compensation and take it from there. I think that is the only way to resolve the backlog problem, and I would suggest that if this is done, if you got the doctors the lawyers and everyone else out of this, and just made the determination of eligibility, it would cost less. It would certainly cost a lot less in the area of human suffering in this claims process.

One other item that I would like to discuss briefly is an area of concern that I have. This centers on the black lung benefit overpayment problem, where interim benefits are paid on the basis of interim awards, only to be stopped and reclaimed on account of a higher level reversal of the award.

These type overpayments should be waived as a matter of law. The Department of Labor is refusing to concede that point and is deadlocking these cases at the lower levels of the administrative process. The act creates a situation where the Government of the United States finds you to be eligible for benefits, and I, the Government, will pay you money, and you need this money, and you spent it. Then 3 or 4 or 5 years later, the Government says well, the judge says we were wrong, now you have to pay it all back. These people who are in retirement are in fear, of losing their life savings, losing their home. As a lawyer, I tell them do not worry, the Government is not going to take your house away from you, but you cannot convince them of that.

The fear is so great that when they get this money, many of them are not spending it. It is there for a purpose. The interim benefits are there to help them meet their bills, but they are afraid to spend it because they are afraid that if they spend the money and they lose their case, the Government is going to take their life savings or their home if they can't repay the interim benefits. I think that this is indefensible insofar as the administration of the act is concerned.

The amount of money involved just cannot justify the kind of suffering that is being caused by putting these people in that state of not knowing. As someone was saying, well, they should declare bankruptcy, then they will not have to pay it back. Isn't that something to look foward to after 40 years in the mines, to have to declare bankruptcy so you do not have to pay back something the Government told you you were entitled to in the first place?

Thank you, gentlemen.

Chairman MURPHY. Thank you very much, Mr. Yablonski. Attorney Kovach.

STATEMENT OF ANTHONY KOVACH, ATTORNEY, UNIONTOWN, PA

Mr. KOVACH. Congressman Murphy, gentlemen, my name is Anthony J. Kovach, and I have been practicing law since 1973. The primary part of my practice has been dealing with occupational disease benefits, specifically Federal black lung benefits and the benefits under the Pennsylvania Workmen's Compensation Act.

Mr. Yablonski is totally correct in what he has described today in black lung. Today, the Black Lung Act and the benefits which it is trying to provide is in a complete state of shambles. Ever since the amendments, the 1981 amendments, have come into effect, it is almost impossible for a claimant's lawyer to have any success of winning a case at all.

They have completely stymied the ability of the legal community, such as myself and Mr. Yablonski and other claimant's attorneys, from trying to win a case. This is just totally impossible.

To date, there are various reasons why these cases are almost impossible to win. It is not because we cannot go out and get medical evidence of disability from an occupational disease. It is because the administration has in various areas stymied the process or procedure of these cases.

It is almost impossible to file an application for benefits and have them come to adjudication within any reasonable period of time. Recently, this year, I had a case where I originally met a gentleman in 1973. His name was William Merritt, and Mr. Merritt applied for benefits. He had never been formally denied benefits, and we finally had a hearing before a Federal administrative law judge last month, and, to me, when it takes 13 or 14 years, since 1973, what is that, 12 years, to have a hearing, and this was the first hearing he had to determine whether or not he was eligible for Federal black lung benefits, we do not have the decision of the administrative law judge yet.

But the irony of the situation is that it was a case against United States Steel. When we walked into the hearing, the counsel for United States Steel, at that point in time, withdrew his contest of the case. This gentleman, in fact, waited 12 years for nothing, and I think it is a shame when the Government—we have a procedure, the proceedings which are supposed to help people as a result of their loss of earning power from a disease process that have to sit around and wait for a period of 12 years.

Mr. Merritt still does not have the benefits yet. He probably will not get them till next year, and it is a crying shame that the gentleman has to turn around and wait that long to get what he rightfully deserves according to the law.

It was the intent of Congress when it enacted the Federal Black Lung Act to provide benefits for people who have sustained a loss of earning power as a result of the disease process of the black lung disease.

It is just ridiculous. On the other hand, we have administrative law judges that turn around and take years to decide a case. The last decision I got from a Federal administrative law judge took well over 13 or 14 months to decide, and I am sure a person, who, like Mr. Yablonski said, is 60 to 65 years of age, has served his country through two World Wars, has to wait 1 year, 1½ years, or 2 years to find out what happened at the hearing that we went to, and they say, Mr. Kovach, what went on, well, you know, we had a hearing, the law says that you have to establish that you are disabled from an occupational disease. Well, did we do that? Yes; I think we did that.

And, then, you have an administrative law judge that says no, I do not think so. I think that the system as it stands now has almost come to a complete standstill through the policies of this Government and through this Government not being able to provide for its citizens.

We have liberals and conservatives. We have had the Federal Black Lung Act changed, I think, three or four times since its initiation, and some people turn around and say well, why can this gentleman get benefits and why cannot I. We both worked side by side in the mines.

Do you know, if a man applied before March 30, 1981, that his probability of winning a case was probably about 50 percent more than a man who applied after that date? There is a great discrimination in the law, and I think it is very hard for the Congress of the United States to say well, he applied then and you applied after that date, so he has a greater chance of being entitled to benefits.

Mr. Yablonski hit the nail right on the head when he said that the 1981 amendments must go. There is no reason for a person to—for an attorney to say well, we know we have a different law now. They say it is all black lung, is it not? Yes; it is all black lung, but we have a different law. Well, why did the law change? Maybe the administration changed it, but the intent of Congress has not changed, and Congress cannot let these people turn around and suffer as a result of the affliction of the disease process which many of their grandparents had, their parents had, which is as a result of being the backbone of this country.

Coal is an industry which a lot of people take for granted. It has always been the backbone of this country. Southwestern Pennsylvania is the backbone of this country. I think if Congress does not take a look at the situation, that many of the people who work in this area are going to receive a great injustice, and not to belabor the point of Mr. Yablonski, but I think they are great points, and we—him and I do basically the same thing and probably agree upon everything, and for this Congress to turn around and let these people down, I think, something has to be done. I think there has to be a drastic change, and it would relate back to the pre-1981 standards, that a lot of people would be benefiting from them. Thank you.

[The prepared statement of Anthony Kovach follows:]

PREPARED STATEMENT OF ANTHONY J. KOVACH, ESQUIRE

The Federal Coal Mine Health and Safety Act, as amended, was originally initiated in order to provide benefits for Coal Miners who became disabled from Black Lung. Miner's Asthma, as the disease process was initially known, has in the past crippled Thousands of American Workers who worked in the Nation's Coal Mining Industry. Coal, being a natural resource and one of the backbones of America, is a vital element to America's Welfare. With this in mind, Congress had enacted the Federal Coal Mine Health and Safety Act, as amended, to provide benefits to Coal Miners who had sustained a loss of earning power as a result of being inflicted with the disease process of Black Lung.

In the past Ten (10) years this Program has almost come to a complete standstill. It presently takes an exorbitant period of time in order to adjudicate a simple Black Lung Case. In my experience in adjudicating Federal Black Lung Claims, it is not uncommon to see a case which is Five (5) to Seven (7) years old. Even though the Claimant may eventually win such a claim, the overall effect is the same as a denial. This was not the overall intent of Congress when it first enacted the Act.

There are various reasons why a case may take Five (5), sometimes Ten (10) years to adjudicate. The basic delaying procedure falls within the United States Department of Labor. Because of the lack of manpower, it sometimes takes the Director's Office Two (2) to Three (3) years merely to process an initial application. On many occasions, because of being understaffed, these Claim Petitions have been lost.

Further, fault lies with the Offices of Administrative Law Judges. The last Decision and Order which I had received from an Administrative Law Judge took a period of Thirteen (13) months from the date of the hearing. With the Director's Office taking Two (2) to Three (3) years to formulate an initial recommendation, and the Office of Administrative Law Judges taking Two (2) to Three (3) years to formulate a Decision and Order, it is no wonder that many Claimants have been disgusted, with the result being that the Federal Coal Mine Health and Safety Act, as amended, has become extremely ineffectual.

Delays have also resulted as a result of the different amendments to the Act which have been initiated. I have been asked many times by Claimants as to why a man who applied before March 30, 1981, can sometimes successfully pursue a claim, while almost no one can win a case if he applied after the date of the last amendment. Discrimination, within the law, has become a sore spot. Some people have successfully pursued benefits because their claim had come within the provisions of the Transfer Act, while others who may be even more disabled can not successfully pursue benefits because they had filed their claim after the initiation of the latest amendment.

The Attorney Fee System provided by the United States Department of Labor is deplorable. This Fee System places upon the attorney the responsibility to decide which claims he could possibly successfully adjudicate. Many Claimants, with fairly substantial claims, never get their day in Court because it may be financially unfeasible for an attorney to represent them. This is particularly devistating to the claimant. There are many Coal Companies that leave no stone unturned, in defending a Black Lung Case. The Attorney Fee Compensation System, as now established, has become one of the major stumbling blocks in giving claimants the right to successfully adjudicate a Federal Black Lung Claim.

Chairman MURPHY. Thank you, Mr. Kovach.

May I ask you, sir, if we repeal, if we were able to repeal the provisions put in the 1981 act, do you believe then that we would go a long way to eliminating our backlog problems?

Mr. KOVACH. I think you would because you have a situation here where the defendant company attorneys, who we deal with every day, are dwelling upon the act that they have now. They are able to turn around and set up something and formulate a defense which we cannot counteract.

I think that we would be able to take the backlog down an awful lot because the claimant attorneys could have something to work with.

Chairman MURPHY. Do you agree with Mr. Yablonski in stating that if we had a 30 year or 25 year—we tried 25, we lost in 1977.

We tried the 25-year presumption, we lost. We had a 30-year presumption, that would eliminate or tend to eliminate the backlog?

Mr. **Kovach**. I think so. I have taken the deposition testimony of many doctors, a lot of them have been B readers, and I turn around and I say doctor, you know, how many years did this guy work in the mines, and he will say well, 35 to 40 years. I said does he have x-ray evidence of coal workers' pneumoconiosis, he says no. Doctor, does he have coal dust in his lungs? Yes. How severe is it? It is pretty severe. I cannot see it on x rays. I know it is there. We have been there many times, taken many biopsies of men who have worked in the mines over 30 years. It is there.

Well, doc, how do you know whether or not that coal dust has caused the breathing problems? He says I really cannot tell because we never took any type of examination of these gentlemen down through the years.

What the situation is is that they are using standards of the average normal American, not the average normal coal miner to find out what his breathing problem is. They hit the nail right on the nose, and I think that would be a great step forward to adjudicate these claims. Getting some type of justice to the American worker because this is what we are talking about. The American worker, the backbone of this country. That is what the intent was of Congress in enacting the act.

Chairman **Murphy**. Mr. Petri.

Mr. **Petri**. Thank you.

I think one of the earlier witnesses, who was an attorney, referred to the system of compensating claimant's attorneys under this, and I just wonder if your cut is adequate or how it is working, and whether it would help if different arrangements were made for compensating claimant's attorneys.

Mr. **Yablonski**. Lawyers never can be paid enough. I honestly think that, to a degree, is a red herring, and most of the attorneys that have been in this practice, while we have grumbled about the fee arrangement, continue to be in the practice.

The Federal program is difficult, difficult primarily because it has never had an established criteria that you could rely on, and because you had people that were nonlawyers determining what counsel fees should be, and people who were not from the area questioning what the going rate is in the area in which you are in.

So in that respect, I think that that is a problem. It is very easily resolved. There are standard rates for trial workers. There are standard rates for office workers, and the committee could make a determination of what those are and fix that rate and that would be it.

On that basis, I think that is all. That is not the problem of the black lung legislation, Congressman. It is one that lawyers are annoyed by, but it is not the real problem of the act.

Chairman **Murphy**. Mr. Rahall.

Mr. **Rahall**. No questions.

Chairman **Murphy**. Mr. Mollohan is out somewhere taking a phone call.

OK. Thank you very, very much, gentlemen. I really appreciate your testimony. I think you have good insight into the problem. Thank you both.

That concludes the panel of our formal witnesses. I want to introduce into the record the statement of Congressman Staggers, who has to leave for his office

[Prepared statement of Hon. Harley O. Staggers follows:]

PREPARED STATEMENT OF HON. HARLEY O. STAGGERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

We are all very much aware of the current problems facing those miners and survivors who apply for benefits under the Black Lung Program. The length of time it takes to process a claim, the tremendous backlog of pending cases, and the operating deficit are all well documented.

I represent a rural district in West Virginia; one of the largest coal producing states in the nation. Nearly every country in my 20 county district produces coal, and there are people who are suffering and unable to obtain their due benefits in each of those counties. As of February 20, 1985, West Virginians had over 3200 cases awaiting hearings before an Administrative Law Judge, while only 160 were scheduled for hearings. I am here before this committee today to express my deep concern for each of those suffering workers and survivors who I represent, just a few short miles from here.

My files are full of cases where claimants have waited for years to receive a hearing before an Administrative Law Judge, or for action by the Benefits Review Board. In one instance, a man from Morgantown, West Virginia, who worked in the mines for 50 years and retired in 1975, finds his claim still pending before the Benefits Review Board 10 years after he first applied.

In another case, a miner from Philippi, West Virginia, applied for benefits in 1976 and did not receive an award until 1979. The operator then appealed and the case has been shuffled back-and-forth between the processing office and the Office of Administrative Law Judges. The Office of Administrative Law Judges still has not received the case. I am told that it will likely be another five years before there is a final determination.

A man from Danese, West Virginia, was disabled in a mining accident in 1974. He immediately filed for benefits and has finally reached the stage where he is entitled to a hearing before an Administrative Law Judge. A hearing has not been scheduled as of this date; 11 years after his original application, and one and one-half years after requesting a hearing.

Another man from Morgantown has waited two years for an Administrative Law Judge to docket his case and set a hearing. For two years the case has been in the Office of Administrative Law Judges with no word about a hearing.

Another man from Philippi was approved for benefits in 1979 and was paid interim benefits from the Black Lung Trust Fund pending an appeal by the operator. His claim was overturned and he had to repay over $20,000 in interim benefits because of the delays in obtaining a hearing. This man is still waiting for consideration of his claim by the Benefits Review Board. He has not heard anything from the Board since November of 1983.

Mr. Chairman, these are but a few examples of many cases in my files that have languished for far too long without a final determination.

There are many problems with the system that need to be corrected. Several proposals that are currently before the Congress, such as increasing the number of Administrative Law Judges and establishing a Corps of Administrative Law Judges to work for all of the federal government's agencies, would certainly help. I do not believe, however, that these proposals will solve all of the existing problems that make the process so difficult. I believe that other measures, that would create accountablity standards for the Administrative Law Judges, and enforce time limits for docketing and hearing cases, need to be adopted.

Mr. Chairman, I would like to thank you and the committee for this opportunity, and for your diligent efforts to help solve these most pressing problems.

Chairman MURPHY. I want to thank everybody in the hearing. This is the first of a series of hearings that will be held, which we hope will finally culminate in any legislative or legal changes that are needed in the law, and also some pressure on the administration to cure some of the defects and remedies that we heard this morning and this afternoon.

I want to thank you all for attending and for participating in the hearing. Thank you.

[Whereupon, at 2:05 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record by Mr. Stanley Maciasz follows:]

Dear Stanley:

The attached refers to a subject in which you are interested, and is, therefore, referred for your information.

Yours very truly

ne United States
Representatives
ourn Building
n, D.C. 20515
225-4665

[illegible]
Charleroi, PA 15022
(412) 489-4217

y 27, 1984

REPLY TO: 365 McClellandtown Rd.
Uniontown, PA 15401

Benefits Review Board
Suite 757
1111 20th St. N.W.
Washington, D.C. 20036

Re: Maciasz, Stanley
R. D. #1, Box 161
Masontown, Penna. 15461
SSN: 198-18-1336

Dear Sirs:

I write on behalf of the above mentioned constituent with regards to his claim for miner black lung benefits. This claim is currently pending before the Benefits Review Board.

I would be most appreciative if you would kindly contact my Uniontown district office with the current status of the above mentioned claimant and any action that is being taken.

COPY

Very Truly Yours,

Austin J. Murphy
Member of Congress

AJM:jj

House of Representatives, U.S.

MEMORANDUM

The attached refers to a subject in which you are interested, and is, therefore, referred for your information.

Yours very truly

Austin J. Murphy

Austin J. Murphy, M.C.

Review Board
th St., N.W.
gton, D.C. 20036

12, 1984

Stanely Michael Maciasq Sr.
OWCP No. 198-18-1336
OALJ No. 81-BLA-10822
BRB No. 83-863 BLA

Dear Congressman Murphy:

I am in receipt of your inquiry regarding the status on the above-captioned claim for black lung benefits.

The brief period required by regulation has closed and this case is under consideration by the Benefits Review Board. I do note that claimant is being represented by counsel.

It is with much concern that I relate that you can expect a considerable delay before a decision can be issued on this case due to the volume of appealed cases presently before the Board for review. Under the circumstances there is really nothing that can be done to hasten the handling of this case.

Unfortunately, I am not in a position to advise as to exactly how long it will be before the Board is able to issue a decision on this case. The Board notes your expressed interest in this case and a copy of our decision will be forwarded as soon as it is issued.

Sincerely,

Sydnee M. Schwartz

COPY

SYDNEE M. SCHWARTZ
Special Assistant to Chief
Administrative Appeals Judge

JOHN W. MCILVAINE

ATTORNEY-AT-LAW

UMWA DISTRICT NO. 4
COMPENSATION DEPARTMENT
32 SOUTH MAIN STREET
2ND FLOOR
MASONTOWN, PA 15461

PHONE (412) 583-7720

70 EAST WHEELING STREET
WASHINGTON, PA 15301

PHONE (412) 228-7770

April 12, 1983

Ms. Agnes Kurtz, Clerk
Benefits Review Board
1111 20th Street, N.W.
Washington, D. C. 20036

RE: STANLEY MICHAEL MACIASZ, SR.
Case No. 81-BLA-10822
Social Security No. 198-18-1336
File No. 845.5F

Dear Ms. Kurtz:

Enclosed for filing are an original and three (3) copies of Claimant's Brief in Support of Appeal and Petition for Review.

Copies of these documents have been served on each of those persons listed on the service sheet attached to the Brief and the Petition.

Very truly yours,

JOHN W. MCILVAINE

JWM/rdk

Enclosures

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20036

STANELY MICHAEL MACIASZ, SR. Claimant,	)	
vs.	)	Case No. 81-BLA-10822
	)	OWCP No. 198-18-1336
UNITED STATES STEEL CORPORATION Employer.	)	
and	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party in Interest.	)	

NOTICE OF APPEAL

1. The Petitioner is Stanley Michael Maciasz, Sr.

2. The Claimant is Stanley Michael Maciasz, Sr.

3. The Employer is United States Steel Corporation, 600 Grant Street, Pittsburgh, PA 15230.

4. The other Party in Interest is Director, Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, United States Department of Labor, Washington, D. C 20210.

5. The date of the filing of the Decision and Order appealed from is March 14, 1983.

6. No Motion For Reconsideration has been filed by any party.

7. The name and address of the attorney representing Petitioner is John W. McIlvaine, Esquire, 32 South Main Street, 2nd Floor, Masontown, PA 15461.

Respectfully submitted,

JOHN W. MCILVAINE

Date: April 12, 1983

BEFORE THE
UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

STANLEY MICHAEL MACIASZ, SR.)
Claimant,) DATE ISSUED: April 12, 1983
)
)
vs.) Case No. 81-BLA-10822
)
)
UNITED STATES STEEL CORPORATION) OWCP No. 198-18-1336
Employer,)
)
)
and)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS)
Party in Interest.)

CLAIMANT'S BRIEF IN SUPPORT OF APPEAL

This case was an appeal from the Decision of Judge James W. Kerr, Jr., of March 14, 1983, denyirg benefits to the claimant.

In this case, the claimant submitted the medical testimony of Dr. Bhatt which showed claimant's disability. Dr. Shively, who is a company doctor and a "B" reader showed claimant's disability. Both indicating that the claimant is totally and permanently disabled from Coal Workers' Pneumoconiosis.

Also showing that the presumption had incurred thirty (30) years, working at the face in the mine.

Also that the Federal Government agreed that the claimant also had a severe case of Pneumoconiosis and has been paying him interim benefits.

The facts set forth above, we feel and pray that the judge, James W. Kerr, Jr., findings will not be used and that the Appellant Court would reinstate the claimant to his rightful benefits.

Respectfully submitted,

JOHN W. MCILVAINE

Date: April 12, 1983

SERVICE SHEET

CASE NAME: Stanley Michael Maciasz, Sr.

CASE NO.: 81-BLA-10822

OWCP NO.: 198-18-1336

DOCUMENT: Claimant's Brief in Support of Appeal

A copy of the above document was sent to the following on April 12, 1983:

CERTIFIED MAIL

Robert D. Lotz
Deputy Commissioner
Division of Coal Mine
Workers' Compensation
Room C-3526, FPB
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Stanley Michael Maciasz, Sr.
R. D. 1, Box 161
Masontown, PA 15461

James D. Strader, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, PA 15230

James W. Kerr, Jr.
Administrative Law Judge
U. S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Suite 290
Pittsburgh, PA 15220

REGULAR MAIL

Carol Ready, Docket
U. S. Department of Labor - ALJ
Room 620, 1111 20th Street, N.W.
Washington, D. C. 20036

Marshall Harris, Esquire
Room 14480
Gateway Building
3535 Market Street
Philadelphia, PA 19104

U. S. Steel Corporation
600 Grant Street
Pittsburgh, PA 15230

JOHN W. MCILVAINE, ESQUIRE

Date: April 12, 1983

BEFORE THE
UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

STANLEY MICHAEL MACIASZ, SR. Claimant, vs. UNITED STATES STEEL CORPORATION Employer, and DIRECTOR, OFFICE OF WORKERS' COMPENSTION PROGRAMS Party in Interest.	DATE ISSUED: April 12, 1983 CASE NO.: 81-BLA-10822 OWCP. NO.: 198-18-1336

PETITION FOR REVIEW

John W. McIlvaine
Attorney for Claimant
32 South Main Street
2nd Floor
Masontown, PA 15461
412/583-7728

AND NOW, comes the claimant by his attorney, John W. McIlvaine, and avers the March 14, 1983, Decision of James W. Kerr, Jr., Administrative Law Judge, was erroneous as follows:

1. The interim presumption was triggered by the report of Dr. John B. Martin and Dr. Naresh Bhatt.

2. There was no substantial medical evidence to rebutt the evidence of claimant.

WHEREFORE, claimant requests this Honorable Board reverse and remand the March 14, 1983, Decision and Order of Administrative Law Judge James W. Kerr, Jr.

John W McIlvaine

JOHN W. MCILVAINE
Attorney for Claimant
32 South Main Street
2nd Floor
Masontown, PA 15461
412/583-7728

Date: April 12, 1983

SERVICE SHEET

CASE NAME: Stanley Michael Maciasz, Sr.

CASE NO.: 81-BLA-10822

OWCP NO.: 198-18-1336

DOCUMENT: Claimant's Petition for Review

A copy of the above document was sent to the following on April 12, 1983:

CERTIFIED MAIL

Robert D. Lotz
Deputy Commissione
Division of Coal Mine
Workers' Compensation
Room C-3526, FPB
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Stanley Michael Maciasz, Sr.
R. D. 1, Box 161
Masontown, PA 15461

James D. Strader, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, PA 15230

James W. Kerr, Jr.
Administrative Law Judge
U. S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Suite 290
Pittsburgh, PA 15220

REGULAR MAIL

Carol Ready, Docket
U. S. Department of Labor - ALJ
Room 620, 1111 20th Street, N.W.
Washington, D. C. 20036

Marshall Harris, Esquire
Room 14480
Gateway Building
3535 Market Street
Philadelphia, PA 19104

U. S. Steel Corporation
600 Grant Street
Pittsburgh, PA 15230

JOHN W. MCILVAINE, ESQUIRE

Date: April 12, 1983

SERVICE SHEET

Case Name STANLEY M. MACIASZ Case No. 81-BLA-10822

Title of Document DECISION AND ORDER - DENYING BENEFITS

I certify that the above document was mailed to the following:

CERTIFIED MAIL

Robert D. Lotz
Deputy Commissioner
Division of Coal Mine
Workers' Compensation
Room C-3526, FPB
200 Constitution Ave., NW
Washington, DC 20210

Stanley M. Maciasz
RD #1, Box 161
Masontown, PA 15461

Martin M. Sheinman, Esq.
1801 Law & Finance Bldg.
Pittsburgh, PA 15219

James D. Strader, Esq.
U. S. Steel Corp.
Room 1442, 600 Grant St.
Pittsburgh, PA 15230

REGULAR MAIL

Carol Ready, Docket
U. S. Dept of Labor - ALJ
Room 620, 1111 20th St. NW
Washington, DC 20036

Marshall Harris, Esq.
Room 14480
Gateway Building
3535 Market Street
Philadelphia, PA 19104

U. S. Steel Corp.
600 Grant St.
Pittsburgh, PA 15230

Mary L. Littlefield
Mary L. Littlefield
General Attorney

Entitlement

In reviewing this claim, the Record in its entirety has been considered. This includes the x-ray evidence, the results of the ventilatory and blood gas tests, the pattern of symptoms, the medical opinions in evidence, the testimony of the witnesses, and the age, education and experience of the Claimant. On the basis of that evidence, the Court concludes that the Claimant is not totally disabled by pneumoconiosis arising out of coal mine employment. Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of this claim.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that the application for benefits herein is DENIED.

Entered this 14th day of March, 1983 at Pittsburgh, Pennsylvania.

JWK/lal

James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

In a report dated January 26, 1982, John G. Shively, M.D. concluded that Claimant has pneumoconiosis but minimal functional impairment. Dr. Shively stated that the major cause of Claimant's symptoms is attributable to the leg amputation. EX-1. Dr. Shively reiterated this position during his testimony November 8, 1982.

Dr. Shively based his conclusions on a physical examination, patient history, symptomatology, chest x-ray, pulmonary function studies, arterial blood gas studies and an electrocardiogram. This is a documented and well-reasoned opinion. After hearing the testimony of the Claimant and Dr. Bhatt November 8, 1982, Dr. Shively testified that he has not altered his opinion. TR. p. 118.

According to the testimony and the curriculum vitae in EX-1, Dr. Shively is board certified in pulmonary diseases and internal medicine. He is also a N.I.O.S.H. certified B reader. Due to Dr. Shively's superior credentials, the Court accepts his conclusions in this case. Further, Dr. Shively's opinions are supported by a preponderance of the objective medical evidence.

The Court finds that the Employer has rebutted the interim presumption pursuant to Section 727.203(b)(2) and (3). Sykes v. Itmann Coal Co., 2 BLR 1-1089 (1980); Johnson v. Cannelton Industries, Inc., 2 BLR 1-1081 (1980).

Since Claimant has failed to qualify for benefits under Section 727.203, this claim must be examined under the provision of 20 C.F.R. Part 410, Subpart D. See Muncy v. Wolfe Creek Collieries Coal Co. 3 BLR 1-627, 634 (1981). However, the evidence does not establish Claimant's total disability under Sections 410.414, 410.422, 410.424 or 410.426. Thus, Claimant cannot be entitled to a finding of total disability due to pneumoconiosis under the provisions of Part 410, Subpart D, including Section 410.414(b) for the same reasons as outlined above.

The Benefits Review Board has held that Part 718 does not apply to claims filed prior to March 31, 1980. Muncy v. Wolfe Creek Collieries Coal Co., supra. The claim sub judice was filed January 15, 1980. However, even if Part 718 applied, the decision reached under 20 C.F.R. Sections 727 and 410 would not change.

The table reflects that for a person 67 inches or less in height the results must show findings equal to or less than an FEV_1 of 2.3 liters per second and an MVV of 92 liters per minute.

Three pulmonary function studies are in evidence. DX-7, EX-1 and CX-2. As all FEV_1 and MVV results exceed the qualifying level, Claimant is not entitled to the presumption pursuant to this subsection.

> §727.203(a)(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the table in the Regulations.

The table reflects that for an arterial pCO_2 of 31, 32 of 36 mm/HG the arterial pO_2 must be equal to or less than 69, 68 or 64 mm/HG, respectively.

Three arterial blood gas studies are in evidence. DX-9, EX-1 and CX-2. All values exceed the qualifying level. Therefore, the presumption is not invoked pursuant to this subsection.

> §727.203(a)(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment.

The other medical evidence in this case consists of the reports of three physicians and the testimony of two of the doctors.

In a report dated December 11, 1981, Naresh Bhatt, M.D. concluded that Claimant is disabled from diabetes, hypertension, pneumoconiosis and amputation of a leg. CX-1. During his testimony November 8, 1983, Dr. Bhatt stated that Claimant is disabled from performing coal mine employment due to pneumoconiosis.

Dr. Bhatt based his opinion on a physical examination, chest x-ray, pulmonary function studies, patient history and symptomatology. The report and testimony of Dr. Bhatt are sufficient to trigger the presumption pursuant to this subsection. Stiner v. Bethlehem Mines Corp., 3 BLR 1-487 (1981).

John B. Martin, Sr., M.D., in a report dated April 10, 1980, diagnosed mild chronic obstructive pulmonary disease. Dr. Martin concluded that Claimant is disabled due to the amputation but not by any lung disease. DX-8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Claimant, Stanley Michael Maciasz, was born October 30, 1921; he is 61 years old. Claimant finished the eighth grade of his formal education. Claimant married Dorothy Fisher Maciasz February 7, 1948. They have no dependent children.

2. Claimant worked for 30 years in coal mine employment. He was last employed as a coal miner in 1979.

3. For purposes of this claim, the United States Steel Corporation, the last employer for whom Claimant worked as a miner for a cumulative period of one year, is the responsible operator.

4. Due to Claimant's many years of coal mine employment, as established herein, involving exposure to dust, the Act and the Regulations grant to the Claimant eligibility for certain presumptions. Section 727.203 of the Regulations establishes what is called the "interim presumption." A miner who has been engaged in coal mining employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis arising out of that employment if at least one of four medical requirements is met.

The Court will list each medical requirement and then analyze the pertinent evidence in the Record:

> §727.203(a)(1): A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis.

Seven interpretations involving six x-ray films are in evidence. DX-11, DX-10, DX-17, CX-1, CX-3 and EX-1. At the hearing, the Employer withdrew its controversion to the existence of pneumoconiosis due to its own x-ray interpretation in EX-1. TR. p. 8. In EX-1, John G. Shively, M.D., a B reader, interpreted an x-ray dated January 16, 1981 as reflecting pneumoconiosis, category 1/1 in six zones.

The Court finds the stipulation of the Employer and the preponderance of the x-ray evidence sufficient to trigger the presumption of total disability pursuant to this subsection.

> §727.203(a)(2): Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in the Act) as demonstrated by values which were equal to or less than the values specified in the table as set out therein.

2. Date/Report: 12/11/81 (CX-1)
Physician: Naresh Bhatt, M.D.
Examining: Yes Date: 6/6/81
Tests performed:
  X-ray CX-1
  P.f. CX-1
Evidence relied on:
  History CX-1
  Work CX-1
  Social CX-1
  Medical CX-1
  X-ray CX-1
  P.f. CX-1
Diagnosis: Claimant is disabled from diabetes, hypertension and coal workers' pneumoconiosis, all of them individually and combined. Coal workers' pneumoconiosis was acquired from cumulative years of coal dust exposure in the mines.

3. Date/Report: 1/26/81 (EX-1)
Physician: John G. Shively, M.D.
Examining: Yes Date: 1/16/81
Tests performed:
  Blood Gas EX-1
  X-ray EX-1
  P.f. EX-1
  Electrocardiogram EX-1
Evidence relied on:
  History EX-1
  Work EX-1
  Social EX-1
  Medical EX-1
  Blood Gas EX-1
  X-ray EX-1
  P.f. EX-1
  Electrocardiogram EX-1
Diagnosis: Non-disabling simple coal workers' pneumoconiosis. Opinion based on mild obstructive defect shown by spirometry, radiographic evidence. Etiology of miner functional changes in view of being a non-smoker, could be coal workers' pneumoconiosis.

3. Date of Examination: 11/10/81 (CX-2)
Physician: illegible
Height: 66-1/4 inches
FEV$_1$: 3.08
MVV: 124
Tracings included: Copies
Cooperation: Good
Comprehension: Good
Results: Normal

ARTERIAL BLOOD GAS STUDIES

1. Date of Examination: 3/28/80 (DX-9)
Physician: Naresh Bhatt, M.D.
pCO$_2$: 31.3
pO$_2$: 88.1
Comments: Normal

2. Date of Examination: 1/16/81 (EX-1)
Physician: John G. Shively, M.D.
pCO$_2$: 32.9
pO$_2$: 69.1
Comments: Moderate hypoxemia

3. Date of Examination: 11/10/81 (CX-2)
Physician: John B. Martin, M.D.
pCO$_2$: 36.1
pO$_2$: 65.7
Comments: Respiratory and metabolic alkalosis and moderate hypoxemia.

MEDICAL OPINIONS

1. Date/Report: 4/10/80 (DX-8) DOL form
Physician: John B. Martin, Sr., M.D.
Examining: Yes Date: Same
Evidence relied on:
    History
    Work
    Social
    Medical
Diagnosis: Mild chronic obstructive pulmonary disease, chronic rhinitis. Condition is related to dust exposure in coal mine employment. Disabled by amputation, not by lung disease.

4. Date of X-ray: 1/16/81 (EX-1)
   Physician: John G. Shively, M.D., B reader Certified in Internal Medicine and Pulmonary Diseases
   Impression: 1/1 q 6 zones

5. Date of X-ray: 11/10/81 (CX-2)
   Physician: George A. Kunkel, M.D., Board Certified, June 1981
   Impression: Coal workers' pneumoconiosis 1/0 p 6 zones.

6. Date of X-ray: 12/11/81 (CX-1)
   Physician: Naresh Bhatt, M.D., Board Eligible
   Impression: 1/0 p 6 zones

PULMONARY FUNCTION STUDIES

1. Date of Examination: 3/28/80 (DX-7)
   Physician: Naresh Bhatt, M.D.
   Height: 65-1/2 inches
   FEV_1: 3.16
   MVV: 122.8
   Tracings included: Yes
   Cooperation: Good
   Comprehension: Good
   Results: Normal
   Note: In medical report of 12/11/81, Dr. Bhatt refers to normal pulmonary function study, but gives no values. (CX-1). In it he says pulmonary function study level is #3.

2. Date of Examination: 1/16/81 (EX-1)
   Physician: John G. Shively, M.D.
   Height: 65 inches

	Bronchodilators Before	 After
FEV_1:	2.9	3.1
MVV:	101	108

   Tracings included: Yes
   Cooperation: Good> see technicians' report
   Comprehension: Good>
   Results: No restrictive defect. Minimal obstructive ventilatory defect unresponsive to bronchodilators.

U.S. Department of Labor

Office of Administrative Law Judges
Suite 290
Seven Parkway Center
Pittsburgh, PA 15220
(Telephone: 412-644-5754)

In the Matter of

STANLEY MICHAEL MACIASZ, SR.
Claimant,

v

UNITED STATES STEEL CORP.
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

DATE ISSUED: March 14, 1983

Case No. 81-BLA-10822

OWCP No. 198-18-1336

Martin M. Sheinman, Esq.
For the Claimant

James D. Strader, Esq.
For the Employer

Before: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Act, 30 U.S.C. 901 et seq. In accordance with the Act, and the regulations issued thereunder, this case was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Pittsburgh, PA on November 8, 1982 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 Code of Federal Regulations. New Parts 725 and 727 were added to Title 20 August 18, 1978, and were published in the Federal Register on that date (43 F.R. 36772 *et seq.*). New Part 718 was added to Title 20 Code

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INVESTIGATION OF THE BACKLOG IN BLACK LUNG CASES

FRIDAY, JUNE 7, 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to notice, at 12:30 p.m., in Wise, VA, Hon. Austin J. Murphy, presiding.

Members present: Representatives Murphy, Rick Boucher, and Chris Perkins.

Staff present: Richard Fiesta, counsel, Subcommittee on Labor Standards; James Riley, legislative assistant; and Dorothy Strunk, Republican senior legislative associate.

Mr. Murphy. The committee will come to order.

This is the second in a series of hearings that will be held by the Subcommittee on Labor Standards of the full Education and Labor Committee investigating the backlog of black lung cases in our Nation.

As chairman of the Labor Standards Subcommittee, I have convened today's hearing in Wise, VA, to continue this investigation of a massive backlog of cases by the U.S. Department of Labor.

This is our second in the series of hearings, the earlier being held in Uniontown, PA where we heard testimony from union officials, recipients of black lung or black lung claimants, and several local attorneys who are familiar with the practice of compensation laws.

It is my hope to build a record in which we can accurately reflect the difficulties being experienced by claimants during the adjudication process. We will eventually be hearing from officials of the Department of Labor in Washington, DC to see what is being done to alleviate this unacceptable situation.

Recently, a new Secretary of Labor was confirmed who has the experience, ability, and character to bring effective leadership back to that Department.

We are hopeful that Mr. Brock will focus some of his considerable talent and energy to see that justice and fairness is restored to the victims of mine workers' pneumoconiosis.

I welcome my colleagues who have joined us here today, and particularly the two members of the full Committee on Education, Mr. Rick Boucher, in whose district we are convening today's hearing.

I thank you, Rick, for inviting us to Wise, VA. It is a beautiful area, and I am sure we are going to hear some very good testimony.

Our colleague from the neighboring State of Kentucky—Mr. Chris Perkins, seated at my left.

Chris, do you have an opening statement?

Mr. **Perkins**. No; go ahead.

Mr. **Murphy**. OK; we will deviate from the panel of witnesses and recognize the Congressman from this district of the State of Virginia, Rick Boucher. Mr. Boucher, you may proceed.

STATEMENT OF HON. FREDERICK C. BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. **Boucher**. Thank you very much, Mr. Chairman.

I want to begin by expressing my appreciation to you as the chairman of the subcommittee for bringing the subcommittee to Wise County today.

And I also want to extend a special welcome to my good friend and colleague, Chris Perkins, who represents our neighboring district in Kentucky, and whose district also contains a very large number of mineworkers.

I am delighted that the subcommittee could join us today in the coal mining hills of southwest Virginia, the home of Virginia's coal economy, and the home of some of our Nation's hardest working coal miners.

It is an honor for us to host this hearing by the subcommittee.

This hearing is a demonstration of the unflinching commitment of this subcommittee to those who toil in the Nation's coal mines, many of whom bear the scars of black lung disease and those who today suffer from pneumoconiosis, a lasting reminder of their hard work and sacrifice to stoke our Nation's energy needs.

Today Congress comes to the people of Southwest Virginia to hear firsthand their experiences with the bureaucratic backlogs and entanglements that characterize the Federal Black Lung Program.

We will have an opportunity to hear from the policymakers in Washington later. Today the people will have their say, and we will bring their insights and concerns to the task of evaluating and, where appropriate, reforming the Federal Black Lung Program.

When I took office in 1983, one of my highest priorities was then, and remains today, serving the needs of active and retired miners.

When we began to focus our constituency service efforts, we were immediately struck by the very serious and inexplicable problems at the Department of Labor's Black Lung Office in Charleston, WV.

We learned that claims filed as early as 1977 have not yet been acted upon. Many claimants have not received so much as a simple correspondence from the Office in more than 4 years; and decisions appealed years earlier had not been forwarded to the Office of the Adminstrative Law Judges for their review.

In 1983, Federal investigators were sent to Charleston and shortly thereafter three claims examiners were indicted and pled guilty to fraud in the processing of black lung claims.

In an effort to expedite the processing of claims, the Office was placed under the management of a new Deputy Commissioner, and eight new positions have been added to the Office's beleaguered staff.

The Office still has a backlog of almost 1,000 cases awaiting an initial determination of eligibility, but the Deputy Commissioner hopes that, by September of this year, he will be in a position to handle initial decisions within 180 days and to handle referrals to the Office of Administrative Law Judges within a period of 90 days.

That in itself is good news, but there are two more steps in the administrative process where the prognosis at present is not as promising.

Because of the reviews mandated by the 1977 black lung amendments, a significant backlog has developed at the Office of Administrative Law Judge level of review.

As of April 1 of this year, there were 21,000 black lung cases pending before that office. It takes the Office almost 3 years from the date files are received to process and issue decisions on each case.

According to a study prepared by the General Accounting Office, it would take at least 9 and as perhaps as many as 35 years for the Office under current staffing and procedures to reduce that backlog to acceptable levels.

That delay is clearly serious, and, in my opinion, it is unconscionable.

The next level of administrative appeal is the Benefits Review Board. That board also has a large backlog of almost 6,000 cases with an average disposition time of more than 2 years.

In 1984, Congress passed legislation designed to address the problems of the Benefits Review Board.

Amendments to the Longshoremen's and Harbor Workers' Compensation Act expanded the Board from three to five members and authorized the utilization of four temporary workers.

Also in that year, Congress appropriated $1.6 million to hire an additional 53 support staff members for the Board. To date, the administration has filled only 23 of those 53 personnel positions; and further delays obviously will hamper the ability of the Board to reduce its current backlog of 6,000 cases.

The frustration and delay which black lung claimants face is particularly intolerable in light of the progressive nature of black lung disease. The longer the delay continues, the worse becomes the condition of those suffering from the disease.

Today we will hear from a witness whose husband died before his claim was settled. In fact, 1 year after his death, the claim remains unsettled today.

We will also hear from claimants who continue to suffer from the debilitating health and financial effects of black lung disease while their claims for benefits linger in the file drawers of the Department of Labor.

Officials from the United Mine Workers and private attorneys will describe legal roadblocks and administrative barricades which hamper their ability to represent black lung claimants efficiently.

Mr. Chairman, the record established at these hearings should be a contribution to this subcommittee's work in its efforts to assist coal miners and black lung claimants and beneficiaries throughout our Nation's coal producing regions.

Thank you once again for coming to Wise, VA, and for hearing this expression of our concerns.

Mr. MURPHY. Thank you, Congressman Boucher, and if you will come over here and work with us for a while.

Take your seat at the table.

I wanted to thank the officials here at Clinch Valley College for their courtesy in allowing us to use their facilities and the splendid manner in which they handled it, and also your very competent local staff who made all these arrangements for us.

So, thank you, Rick.

We are going to divide the witnesses into three panels. We had a little bad weather in the air. That is why we are a little late getting here, and that is why we are going to try to expedite by having three panels so that we can be airborne again by 3:30 or 4 o'clock and miss the thunderstorms.

Our first panel of witnesses are Mr. Clyde Sparks, a claimant from Richlands, VA; Mr. Byrd Blankenship, a claimant from Haysi, VA; Mrs. Carnell Rasnake, a claimant from Cleveland, VA.

The witnesses will please take their places at the witness table. We will proceed.

Since you are listed first on here, Mr. Sparks, we will ask you to go ahead with your testimony first.

STATEMENT OF CLYDE SPARKS, CLAIMANT, RICHLANDS, VA

Mr. SPARKS. My name is Clyde Sparks. I am 51 years old, and I live in Richlands, VA.

I am married to Dorothy Sparks. I have been married for 34 years. I have four children. One of them was born in 1953, one in 1955, one in 1959, one in 1962.

And I started working in the mines at a very early age. My mom and my dad both got sick and it was left up to me to help make the living. There were six of us children; and, although I was not old enough to do a lot of the work in the mines, I started to work at 11 years old. I drove a pony in a small mine.

And I drove a pony until I got old enough to load coal.

I worked from the time I was 11 years old until 1959, in the coal mines, which is when I got disabled to work.

In the condition of the coal mines, I did not have much air, and when we shot the coal, we had to go back in on the smoke. Many times we had to crawl up because we would get down on the air that was in the mines, and we did not have any equipment. We loaded the coal by shovel. This is the way we loaded the coal.

And my breathing got bad when I left the mine, and then it got worse. In 1960, after I quit mining, I went to barbering, and I barbered for 16 years and when I kept noticing my breathing was getting bad I went to the doctor and he advised me—at the Mattie Williams Hospital—to have a chest x ray and see a lung specialist.

On December 27, 1977, I signed up for my black lung, but I still tried to work even though I was not able as a barber; and 2 years ago, they hauled me away from the barber shop, a heart attack.

I have not been able to work since. The first heart attack was in 1976, and I had a hearing—or I started to have a hearing in 1982, and Patricia Larkin, she wanted more evidence, and it was called off.

Then in 1983 I got a call from a lady from Charleston which said she was a Commissioner, and she told me that I had black lung, but you did not get it coal mining.

And I had been struggling with this all this time. My activities are limited. I can barely go to the store, post office, and barely do what I have to do.

And I got a—the doctor put me on a breathing machine, which I kept 2 months, and I was unable to make the payments on it; and I had to let it go.

He also says I need a hospital bed so I can raise it up so I could breathe at night. I have not had a good night's sleep in I don't know when.

And I am on three different types of medicine for my breathing. I take Coloflin [phonetic.], which is a breathing pill, and I take two other pills that help oxygen to circulate to my heart.

If I had anything to say to the black lung people, I say when people have the proof that they have black lung, why don't they pay them and let them enjoy it while they are able, not wait until they are almost dead.

God bless you.

Mr. MURPHY. Thank you very much, Mr. Sparks.

[The prepared statement of Clyde Sparks follows:]

PREPARED STATEMENT OF CLYDE SPARKS

My name is Clyde Sparks. I'm 51 years old and I live in Richlands, Virginia. I started working in the mines when I was eleven or twelve years old. My mother and father were both sick. I had six brothers and we all did our part to help out. At first I worked driving a pony, but in a short while I began loading coal. I worked up to twenty or twenty two cars a day. Got paid a dollar a car. That was pretty good pay then.

I've worked in coal one and a half feet to forty-two inches high. Sometimes I've have to crawl outside because I was about to pass out from bad air.

I came out of the mines in 1959 after fifteen years. I started barbering and worked at that for about sixteen years, and I didn't stop until they carried me out with a heart attack in 1978.

I've been having bad breathing problems since 1960. At first I didn't know what the problem was. I've worked in church most of my life, did a lot of song leading. I could tell it in my song leading first of all. I got so I noticed it whenever I got out to walk or do anything straining. It just kept getting worse.

I had my first heart attack in 1976. After that a doctor at Mattie Williams told me that I should get my lungs checked. I had an appointment with a lung doctor and he told me I couldn't do any coal mining work or any other kind of work. So I filed for black lung in 1977. For some reason, I don't understand why, my claim stayed in Charleston until 1982. I had a hearing in 1983, and the judge sent the claim back to Charleston and Charleston turned me down again. The lady who called me from Charleston said I had black lung but I didn't get it in a coal mine. I will have another hearing this month.

I'm taking breathing medicine four times a day and use an inhalor. Sometimes, I'm in the hospital three or four times a month to get shots to ease my breathing. Every time I stay in the hospital, they put me on a breathing machine. The doctor got me a breathing machine about two years ago. I kept it a couple of months, but I had to send it back. It cost over $400 a month, and I couldn't afford it. My wife isn't able to bear any of the load at all. She is sick and has a heart condition. And I've only been on Social Security a year—not long enough to get medicare.

I kept trying to work and keep my family up when I really wasn't able. I kept working after my first heart attack and didn't stop until I had to. I'm told that I have heart attacks because of my lungs. I just don't get enough oxygen. I stay so tried I can't hardly make it. Sometimes my chest hurts so bad I cry. I have to prop my head up at night on two or three pillows to sleep. I can't remember when I had a good night's sleep.

I've been trying to get black lung benefits for eight years. I don't see what's taken so long. I don't want something that doesn't belong to me. But I worked in the mines past when I was able, and if anybody's due it, I am.

Mr. MURPHY. Mrs. Rasnake.

STATEMENT OF CARNELL RASNAKE, WIDOW OF CLAIMANT, CLEVELAND, VA

Mrs. RASNAKE. My name is Carnell Rasnake, and I live in Russell County in Cleveland.

I married Marvin Rasnake in 1961. We had five children. Their ages are from 15 to 23.

Marvin worked in and around the mines most of his life except when he was in the Army in World War II, in Germany.

He was 18 years older than I was, and I only knew about the last 12 years that he worked in the mines. In 1977, he got so he couldn't breathe. Back in 1976, they had to bring him out of the mines three or four times because he couldn't breathe.

Then he filed for his black lung claim in 1977, and his benefits were approved in 1979, and he started getting the benefits, but the coal company fought it, and in 1980 the benefits were stopped. They stopped them after he had a hearing, and he was told to send back his medical card.

And by 1980 his health had gotten much worse. He couldn't bend over. He couldn't walk up a steep bank without being plumb out of breath. He had to be propped up in bed so he could sleep at night.

In 1982, they put him on a breathing machine, and he had to use Broncosol and saline before he could breathe. And then by—after he lost his black lung, medicare picked up some of it, but didn't pay for all of it.

It took from 1980 until 1984 for the Benefits Review Board to make a decision on his claim, and during this time in 1983 the doctor said that he had lung cancer, and said that the biopsy showed a lot of black lung that was the cause of cancer before he worked in the coal mine. The black lung had turned to cancer.

And he took the radiation treatments, but in early 1984, the cancer spread to his brain.

And in May 1984 the Benefits Review Board turned him down on his black lung.

During the last few months, he stayed in the hospital practically all the time. He would come home for a couple of days and then have to go back again.

It was while he was at home toward the end of August when he died. And after he died, they did an autopsy on him, and now it looks as if his claim is going to be approved.

I need it because I still owe about $5,000 on his doctor's bills, and whenever they cut his black lung out, I had to borrow money from the bank to buy his medicine with.

And then when he died, he owed $1,000 to the bank that he borrowed for medicine. And then I have to pay on his radiation treatments and anesthesia and all that to the hospital in Bristol and Lebanon and Richlands.

And I have two children at home, and one of them is in school, and one of them is laid off from where he worked in the coal mines.

And I think the Department of Labor dragged his claim around too long because they had from 1977 until now to decide something definite on his claim.

It has been 5 years since they cut off the benefits, and it was 5 years when he was getting sicker and sicker, and he could really have used the money at that time.

And he lost down—he weighed 187 pounds, and he lost down to 96 pounds during his sickness, and the people who knew him and when they hadn't seen him for a long time, they didn't know who he was.

And I think something should be done so the other miners won't have to go through what we went through.

And I want to thank Mr. Boucher for all he's helped us on, because I think without his help, we wouldn't be this far along.

Mr. MURPHY. Thank you very much, Mrs. Resnake.

[The prepared statement of Carnell Rasnake follows:]

PREPARED STATEMENT OF CARNELL RASNAKE

My name is Carnell Rasnake and I live in Russell County in Cleveland. I married Marvin Rasnake in 1961. We had five children. The oldest is 23 and the youngest is 15. Marvin worked around the mines all his life except during World War II when he served in Germany. He could prove about twenty years.

Marvin was eighteen years older than I am, and I only know about the last twelve years he worked. Around 1977 he got so he couldn't breathe. He filed a claim for rock dust and drew on that for a few months. His claim for black lung benefits was approved in 1979 and we started getting benefits. We were lucky at first. But the coal company fought it and in 1980 the benefits stopped after a hearing. He was told to send back his medical card.

By 1980 Marvin's health has gotten much worse. He couldn't bend over. I had to tie his shoes for him. He couldn't sleep without being propped up. He could walk a little on level ground, but not up a bank. He was taking medicine to ease his breathing and seeing the doctor about once a month. By 1982 he had to go on oxygen. After he lost his black lung medical card, medicare picked up some of the medical expenses, but not all.

Marvin handled his black lung claim. I didn't follow it too closely. But I know that it took from 1980 until 1984 for the Benefits Review Board to make a decision on his claim. During this time, in 1983, the doctor said that Marvin had lung cancer. He said that the biopsy showed a lot of black lung, and he said that the cancer was because of his coal mine work. He took radiation, but in early 1984 the cancer went to his brain. And in May of 1984 the Benefits review Board turned him down on his black lung.

Marvin was not the kind of person to worry a lot out loud, but he would get real quiet, and I could tell how worried he was.

During the last few months, Marvin stayed in the hospital practically all the time. He would come home for a couple of days and go back for a while. It was while he was at home toward the end of last August that he died. After his death they did an autopsy, and now it looks like his claim is going to be approved. And I really need it. I still owe at least five thousand dollars on Marvin's hospital and doctor bills. I'm paying on the radiation treatments and the anesthetic a little a month and trying to pay on the x-rays, two different doctors, and three different hospitals. I still have two children at home—one in school and one laid off from the mines.

What's sad is that it comes too late for Marvin. That would have been one less thing for him to worry about. I think the Department of Labor dragged his claim around and didn't work on it and didn't try to help him. That claim laid around for years—long enough for anybody to get a decision on it. Its been five years since they cut off the benefits. Five years when Marvin was getting sicker and sicker—when he went from 187 pounds to 96 pounds. People who knew him couldn't even recognize him at the end.

Something should be done. I don't think anyone should have to go through what Marvin and the rest of us went through.

Mr. **Sparks**. I would like to say just one thing. I have a hearing coming up in June 27. I forgot to mention that.

Mr. **Murphy**. Thank you.

Mr. Blankenship.

STATEMENT OF BYRD BLANKENSHIP, CLAIMANT, HAYSI, VA

Mr. **Blankenship**. My name is Byrd Blankenship. I live in Haysi, VA.

I have black lung, and I can't hardly talk. It may cut out on me, OK. It is bad.

Mr. **Murphy**. Pull that mike up right close to you.

Mr. **Blankenship**. I can't even talk on the phone. Anyway, I went to my doctor back in 1973, J.P. Sutherland—he discovered I had black lung.

Then I got the black lung in 1973. It went on down and I never did get a hearing or anything until now, which I do get, they say.

I went down in 1978; I had a stroke in my left side and also, I had a heart attack in 1980.

I don't know—I can't breathe. I had a machine. Dr. Modi gave me machines, which was a heart machine. They cost $495 a month, and I couldn't afford that, plus my Medicare.

I need the help. I need more. The Medicare, that's not doing it. I need the benefits. I need the machine, because Dr. Modi told me I had to use the machine, and I can't even afford them for a month.

Back in 1982, I had Blue Cross. They paid it for a little over a year for me. With the machine at my house, and then they come and picked it up, because they wouldn't go no more—and they paid the rent up to then. It is $95 a month. I can't afford that, no way in the world.

And my medication—I've got medication right now that I can't even fill the prescriptions. I sure can't.

Mr. **Murphy**. Thank you, Mr. Blankenship.

[The prepared statement of Byrd Blankenship follows:]

Prepared Statement of Byrd Blankenship

My name is Byrd Blankenship and I am 58 years old. I am currently residing in Haysi, Virginia.

I started working in the coal mines when I was 17 years old, then joined the service during World War II and served until 1946 overseas. After coming back home, I worked in the coal mines in Virginia and Kentucky up to April of 1955.

The jobs I did in the mines were underground—hand-loading coal, shot coal, drove ponys to pull the coal out of the mines. Would hand-load 36 to 40 tons a day alone as we were paid according to how much coal we loaded. Didn't have any breathing aids, even when the mines were smokey after we shot coal, we still worked in there. We used those carbide lamps; this was before those portable ones were used. That's the same fumes those 25,000 people died of and we breathed it too.

My breathing got bad and I quit in 1955. We moved to Detroit, Michigan and I began working at the Cadillac car factory.

I spent over thirty days in a Detroit Hospital for lung problems. This was approximately 1974 or 1975. I have several times been treated for lung problems. In 1973, Doctor Sutherland in Grundy, Virginia recognized it as black lung. I filed for black lung benefits in 1973. My case was denied. It was sent from Washington to Columbus, Ohio, but I don't know why. Guess the attorney I had in Detroit had appealed the case, because I never had to refile. I moved back to Virginia and got me another attorney. My case was sent to Charleston, West Virginia after that. In January of 1981, I received a card in the mail saying a hearing would be scheduled for me in the future. I never heard another word until Congressman Boucher helped me. He got the hearing speeded up.

I've had to take 8 or 10 blood and gas tests—it's a hard test where you have to blow in a machine, makes you dizzy and weak. I had a stroke in September of 1978 and a heart attack in July of 1980 and the tests makes my heart beat faster.

I've had serious breathing problems since 1985. Now I have to use medicine all the time—tube inhalant. The nitro I take for my heart helps my breathing too. It's difficult to sleep at night. The most I ever sleep is one hour. Usually have to get up and sit on the bed or try and move around a little. Walking is getting harder and harder to do. Just the things I did a couple of years ago, I'm no longer able to do. Can only walk a short distance before I get tired.

Seems to me a black lung medical card is almost more important than the benefits really. My doctor keeps asking me if I've gotten that card yet. However, I do feel the benefits are due me.

People are not doing me right. I think the Pros in the office are holding me up. They are taking newer cases before the older ones. I know of some people that put in for their black lung benefits and within six months they were drawing it, but I'm still waiting after twelve years.

VANSANT MEDICAL CLINC,
Grundy, Va., April 7, 1983.

BLUE CROSS/BLUE SHIELD,
Richmond, VA.
Re: Byrd Blankenship, General Delivery, Breaks, VA.

Please be advised this patient was prescribed for a breathing machine in January 1982.

Mr. Byrd Blankenship will need this Breathing Machine x3 for the rest of his life time.

V.D. MODI, M.D.

Mr. **MURPHY**. Let me ask you, what year did you file for your benefits?

Mr. **BLANKENSHIP**. 1973.

Mr. **MURPHY**. And you are not receiving benefits at this time?

Mr. **BLANKENSHIP**. The first I heard from them I got a card back in 1981, in January, and they said they would process it as soon as possible.

Mr. **MURPHY**. And you filed your claims in 1977, both of you filed in 1977. And you had a hearing before an administrative law judge?

Mr. **BLANKENSHIP**. We started to have one, and it was Patricia Larkin. She asked for it to be put off.

Mr. **MURPHY**. Have you had yours yet, Mrs. Rasnake?

Mrs. **RASNAKE**. Yes, sir.

Mr. **MURPHY**. You have.

Mrs. **RASNAKE**. Yes.

Mr. **MURPHY**. How many years did your husband work in the mines, Mrs. Rasnake?

Mrs. **RASNAKE**. Well, he worked there most of his life, but he could only prove, you know, about 18 to 20 years, because back then, they didn't pay him social security.

Mr. **MURPHY**. OK, well, thank you very much.

Mr. Boucher, do you have questions?

Mr. **BOUCHER**. Thank you, Mr. Chairman.

First of all, I want to thank all three of these witnesses for taking the time to join us here today, and to share their experiences with the subcommittee. I think this testimony is very valuable, and will clearly help the subcommittee as it continues its work.

Mr. Sparks, I particularly want to thank you, because I understand from my staff that you were scheduled to go into the hospital today to be treated for your black lung disease.

Mr. **Sparks**. I went to the doctor yesterday; he wanted to put me in the hospital.

Mr. **Boucher**. And you declined to do that just so you could come and be with us today. We particularly appreciate that on your part.

Mr. Blankenship, I know you have been in the coal mines for a long time, haven't you?

Mr. **Blankenship**. Well, about 10 years, and married about 23 years——

Mr. **Boucher**. When did you start working in the mines?

Mr. **Blankenship**. About 17 years ago. I started young, just messing around in the coal mines, you know.

Mr. **Boucher**. Tell me this, what kind of work did you do when you were working in the coal mines?

Mr. **Blankenship**. Well, I've shot coal; I've loaded coal by hand; pony driver, and everything else.

Mr. **Boucher**. You were working in the days before they had all the mechanized equipment that they use in coal mines today.

Mr. **Blankenship**. Right; we even used carbide lamps back then for lights.

Mr. **Boucher**. How was the coal separated from the face? What did they do to get the coal out then?

Mr. **Blankenship**. Well, they had machines doing it one way; and then the other way, we shot it—what we called the solid beagle.

Mr. **Boucher**. What was the air like after the coal was shot?

Mr. **Blankenship**. Well, it was pretty bad, I'm telling you. I went up in it after we would shoot it. I went back up in there and shoveled coal. You know, of course, that was my business. I was young then, and it didn't make any difference. I went back in on that smoke. By the time I got back I had a bunch of sweat on me.

Mr. **Boucher**. Was the air thick with dust after they shot the coal?

Mr. **Blankenship**. Oh, God, yeah.

Mr. **Boucher**. Did they have any kind of breathing aids back then?

Mr. **Blankenship**. We used to have what they called—you know, bradishman and all; and he would come up to the place, but it wasn't a walk back in. We wanted to hurry because we were loading the car of coal. That is the way we had to get our money.

Mr. **Boucher**. I know it is not related to the subject, but how many tons a day could you mine and load yourself?

Mr. **Blankenship**. 40 tons.

Mr. **Boucher**. Well, that is pretty remarkable.

Mr. **Blankenship**. We did it. I even got proof of that. But it was in a truck, and it was all—we didn't do anything but shovel coal.

Mr. **Boucher**. Now, Mr. Blankenship, I understand that you filed your claim for black lung benefits in 1973.

Mr. **Blankenship**. That's right.

Mr. **Boucher**. And there is still no decision in your case.

Mr. **Blankenship**. Nope.

Mr. **Boucher**. More than 10 years have passed and you still don't have a final decision.

Mr. **Blankenship**. Twelve years.

Mr. **Boucher**. If you could say what you wanted to say to the people who were administering the Black Lung Program, what would you say?

Mr. **Blankenship**. Well, in other words, I would want at least my benefits, you know, medical—because just like what my doctor said, it don't look like I'm going to be here much longer.

Mr. **Boucher**. Mrs. Rasnake, I appreciate your being with us here today also.

I believe that the claim for your husband was filed in 1977?

Mrs. **Rasnake**. Yes, sir.

Mr. **Boucher**. And there is not a final decision after various levels of review as of today. Is that correct?

Mrs. **Rasnake**. Right.

Mr. **Boucher**. And let me just ask you. What would you say to the people who administer the Black Lung Program, if you had the opportunity to address them personally, and to make comments?

Mrs. **Rasnake**. Well, I would like for some of them to have to live just 1 week with somebody that had it, to see what they really had to go through.

And I think they just pitch the papers back and drag them on too long, and I think if they had to see them suffer for 1 week, then you would know what they are going through with.

Mr. **Boucher**. Well, I again want to thank all three of these witnesses with us today, and that concludes my questions, Mr. Chairman.

Mr. **Murphy**. Thank you.

Mr. Perkins?

Mr. **Perkins**. Mr. Blankenship, how many years did you say you worked in the mines?

Mr. **Blankenship**. Well, 10 years.

Mr. **Perkins**. Ten years? You worked 10 years, or that was how long you proved.

Mr. **Blankenship**. Well, 7½ or something.

Mr. **Perkins**. So, you worked 10, and you got 7½?

Mr. **Blankenship**. Yes; I believe 7 in the mines—they didn't even pay on the record then. The subcon and I worked for them.

Mr. **Sparks**. That used to be called gang working.

Mr. **Blankenship**. They contracted out—they contracted $1.50 a car——

Mr. **Perkins**. Mr. Sparks, did you say you worked about 14 years?

Mr. **Sparks**. Between 14 and 15 years.

Mr. **Perkins**. And during that time period you were involved inside the coal mine a whole lot of the time, is that right?

Mr. **Sparks**. All the time.

Mr. **Perkins**. Now, at what stage of the hearing process have you all gotten to?

Have you had your administrative hearing? Your husband did. Of course, you had an autopsy, which is supposed to be evidence on the thing.

Mrs. **Rasnake**. Yes, sir.

Mr. **Perkins**. And where have you all gotten to?

Mr. **Blankenship**. We won that first——

Mr. **Perkins**. You never had a hearing since 1973?

Mr. **Blankenship**. No.

Mr. **Perkins**. And you filed in 1977?

Mr. **Sparks**. In 1977.

Mr. **Perkins**. And you never had a hearing?

Mr. **Sparks**. We started to have the hearing in 1982 and the woman, by the name of Patricia Larkin—I don't know what part she played, but she had asked them to put it off—60 days, they said, but that was the last of it.

A lady called from Charleston, just a phone call. But I do have a hearing coming up the 27th of this month.

Mr. **Perkins**. You filed in 1977, and you filed in 1973—8 years in one instance and 12 years in another, and you haven't had a hearing?

Mr. **Blankenship**. January of 1973 when I filed, and my doctor then said I had it back then. It's true. I have the papers to prove it.

Mr. **Perkins**. OK; Thank you.

Mr. **Murphy**. OK; we want to thank the three of you for coming here and giving us your personal experiences. It has all been made a part of the official record that will be transcribed and submitted with our report to the full committee within the next 30 or 40 days.

Thank you very much for being with us.

Mr. **Blankenship**. Thank you.

Mr. **Murphy**. While we are getting ready for the next panel of witnesses, I want to recognize in the audience—it has been called to my attention by Congressman Boucher—that State Senator John Buchanan of the Commonwealth of Virginia is with us.

Senator Buchanan has been very active in assisting black lung claimants and assisting with the drafting of the law in the Commonwealth of Virginia.

So, Senator, thank you very much for being with us.

Senator **Buchanan**. Thank you.

Mr. **Murphy**. The next panel of witnesses is Mr. Hobart Robinson, an attorney in Abingdon, VA; Mr. Robert Winston, an attorney in Wise, VA; and Mr. Larry Browning, an attorney in Lebanon, VA.

All three of these counselors are quite familiar with the handling of black lung compensation.

If you gentlemen will take the witness chairs, please.

Mr. **Murphy**. OK, Mr. Robinson, I'll ask you to go first.

Mr. **Robinson**. Thank you, sir.

STATEMENT OF W. HOBART ROBINSON, ESQ., ABINGDON, VA

Mr. **Robinson**. At the outset, I'd like to thank Congressman Boucher for his great assistance to my clients and many of the claimants that have contacted him. We have found that he has a very efficient staff in Abingdon, and it is very gratifying to see the quick response that you receive.

And I've mainly come here today about the frustration that we have with the lack of response to correspondence with the Department of Labor. As I have commented in correspondence to the Department of Labor, at times, it is like dropping a letter in the well. It's sort of a surprise, sometimes, when you get a quick response.

As an example, I have some cases that I've just made a list of. But in the case of Mr. Roger Underwood, he was examined by a physician, a respiratory specialist at the request of the attorney who represented the responsible operator. That physician found that the claimant was disabled for coal mining employment as a result of the black lung or pneumoconiosis.

This coal miner was unable to participate in the safety program when they would declare emergency to escape from the mines, he was unable to crawl out through a passageway that was provided for escape, because of shortness of breath. And the physician pointed this out in his report.

That report was filed in November 1984, by Attorney Dennis Johns, who represented the operator.

When the correspondence was forwarded to the administrative law judge, the report was not in the file. So, I wrote a letter in March, and I received no answer. I wrote a letter in April; I received no answer. I wrote a letter in May, and I said to the Deputy Commissioner, "I think I'll get in my car and drive to Charleston to see if there really is an individual living by this name."

So, I just mention that case, but there are numerous situations like this. I think the problem with the Labor Department is just like the problems Mr. John Kennedy experiences in talking to coal miners. That you have to think safety when you enter that mine. If you don't think safety, somebody's going to lose a hand; somebody's going to lose a foot.

And with this Black Lung Program, you've got to think expeditiously. How can we expedite this? And I believe that the only way that can be accomplished is, if I have 20 cases that require certain time limitations, somebody in the Labor Department is going to have to walk in to the claims examiner and say, Robinson, why have you had this case so long? Why can't this case be moved along?

An example of one of the cases I gave you on Mr. Remines VanDyke. He worked in coal mining employment from 1939 to 1974. His claim was denied by the Social Security Administration because he had worked after June 30, 1973.

Now, Mr. VanDyke, after working that many years in the mines, died on September 29, 1979, and then his wife filed the application; she died on July 5, 1980. So, I don't know whether that leaves the children, but they're disturbed over the fact that their father received this type of treatment.

Now, what disturbs me is, I had a client who worked for Consolidated Coal, and last worked in June of 1983. They tried to force me to go to a hearing on May 24, 1984 and give the man a breathing test the day before the hearing. Well, I didn't know what the test might say; I didn't know anything about the facilities, and yet, I had a claimant in my office at that time who last worked in 1973, Mr. James Little, who lives in Coeburn. And he worked 28 years for Clinchwheel Coal Co., and we had tried repeatedly to get a hearing in his case, and couldn't get a hearing.

And yet, this other man quits work in 1984, and is immediately brought in to a hearing. And so I called the Department of Labor about it, and gave them the Social Security number, and they told me they took these cases by number. I said, run this through your computer. I don't know—the lady I was talking to was in the Washington office, and she agreed.

And so Mr. Little now has had a hearing after that, but it is very frustrating to these people—they're already in poor health, they're just lucky if they reach the sixties and seventies, and it just brings a cloud over the entire Government, when they feel like the Government is not giving them a fair shake.

And, one other thing, as I say, you have to think expeditiously, if you want to get the job done. Just the same as you would say, think safety. I had a case of Mrs. Burley Hawkins. The administrative law judge was in Abingdon, and there was a vacancy on his schedule. I called the Labor Department and I talked to that judge, and that judge was willing to bring her case and hear it.

But the attorney who was representing the Department, could not make enough adjustment, for that lady's case to be heard. So I think it's got to be instilled in these attorneys who are representing the Department of Labor, that we're dealing with sick people; and that you have to be flexible at times.

You gentlemen certainly know about flexibility. You have to be three places at the same time, sometimes it seems that way, but I think we have to have that type of thinking.

I have nothing further to say.

[The prepared statement of W. Hobart Robinson follows:]

PREPARED STATEMENT OF W. HOBART ROBINSON

LIST OF CASES OF INCONSIDERATE ACTIONS BY THE U.S. DEPARTMENT OF LABOR

James W. Necessary, Route 2, Damascus, VA—OWCP 234-09-3886, Case 81-BLA-967, BRB 82-1444-BLA.

Claimant filed his claim on 2-14-73. A hearing was held on 3-8-82. The Administrative Law Judge made a favorable decision on 7-16-82. The Solicitor filed a notice of appeal on 7-16-82, even though the physician who evaluated the pulmonary function studies of Dr. Richard S. Buddington of Abingdon, VA, found that the qualifying pulmonary function studies were valid.

Mr. Necessary is 77 years of age. He is skeptical about spending the money he received on his claim. In a letter dated 8-23-82 to Senator Warner, Mr. Necessary complained about the "runaround" that he had received on the processing of his case and pointed out that it took four lawyers to submit a notice of appeal and that he was 75 years of age and thought he was being treated unfairly. I do not know if Mr. Necessary received a reply or if Senator Warner received a reply.

Arthur Swann, Route 1, Box 8, Coeburn, VA—OWCP 229-01-5111, Case 82-BLA-5838, BRB 85-824 BLA.

The Benefits Review Board has held that working in coke ovens was not coal mining employment *Morris* v. *Director,* 6 BLR 1-653, 1-655 (1983). On the basis of that decision, Mr. Swann's claim was denied and he worked thirty years at the coke ovens where the coal was taken to the ovens before it was processed to the tipple for loading into railroad cars. There is no more arduous labor and no greater exposure to coal dust for any employee than that employment where the coal comes out of the mines and is dropped into ovens for the extraction of the impurities. To contend that such employment does not relate to the extraction of coal shows no consideration whatsoever for this group of individuals and it is just another means of denying benefits regardless of the situation.

Sidney Shortridge, Route 2, Box 97A, Grundy, VA—OWCP 229-09-2916, Case 80-BLA-4329.

The Administrative Law Judge approved a fee in the amount of $467.50 on 7-28-82. As of this date, 5-30-85, the fee has not been paid. A fee petition was forwarded to the Deputy Commissioner on 5-11-82 for services rendered before the Deputy

Commissioner, Robert Lotz. As of this date, there has been no reply whatsoever from the Deputy Commissioner.

Sidney Adams, 2 Green Valley Road, Bristol, VA—OWCP 227-10-9701, Case 80-BLA-2167.

The claim was approved by the Administrative Law Judge on 11-26-80. The ALJ approved a fee petition in the amount of $1106.26. As of this date, the Deputy Commissioner has not acted on the fee petition submitted for services rendered on the case before it was referred to the Administrative Law Judge.

Clyde Murphy, Route 2, Box 293, Grundy, VA—OWCP 236-34-0369, Case 76-BLA-49, BRB 76-136 BLA.

A hearing was held on 9-16-75. After the case was remanded by the U.S. Fourth Circuit Court of Appeals and the claim was approved, I was not notified. A fee petition in the amount of $2473.75 for 40 hours of service was filed on 6-3-81. An order was issued approving a fee of $916.25 on 2-23-83 with the remainder of the time being referred to the Deputy Commissioner. As of this date, the Deputy Commissioner has not acted on the petition for the time spent before that office. The Benefits Review Board approved a fee for $230.00 on 3-30-84 allowing $65.00 for part of the time and $70.00 for the remainder.

Remines VanDyke, deceased. Carrie VanDyke, deceased. Bill R. VanDyke, son, P.O. Box 244, Grundy, VA—OWCP 224-12-7403, Case 84-BLA-05457.

Remines VanDyke failed a claim for black lung benefits on 5-4-76. He last worked in coal mining employment in January, 1974. He worked as a coal miner from 1939 to 1974. He had a UMWA pension which would require twenty years coal mining employment. His claim was denied by the Social Security Administration because he worked after 6-30-73. The Administrative Law Judge for the SSA found that the claimant had pneumoconiosis, but denied the claim because Mr. VanDyke worked after 7-1-73. He contended he had 35 years coal mining employment and the physician who had examined him in April, 1975, Dr. Paul L. Odom, found the claimant to be disabled for coal mining employment.

Mr. VanDyke died on 9-29-79 and his widow filed an application and she died on 7-5-80. The administrator of the estate is now insisting on a hearing, contending that the deceased parties were deprived of their rights and benefits by the Government's delay.

Alexander W. Hatfield, 3612 Signal Hill Ave., Roanoke, VA—OWCP 229-01-7414.

The claim was approved on 9-4-79. The Deputy Commissioner approved $300.00 for attorney's fees. A letter of inquiry was submitted on 3-10-80 regarding the $300.00 fee and there has been no reply.

Inus Marie Hunter, widow. James K. Hunter, deceased, General Delvery, Pilgrim Knob, VA—OWCP 223-12-5460.

In August, 1979 the Department of Labor indicated they were going to approve the claim and requested a death certificate and some additional information. The additional information was forwarded on 9-6-79 and there has been no reply since that date.

Edgar Stiltner, General Delivery, Harman, VA—OWCP 226-22-9733.

A fee petition was filed on 6-21-83 for a fee in the amount of $1942.95. No response whatsoever has been received, however, an attorney who first represented the claimant and whose representation was terminated because the claimant was displeased with his services, had a fee approved in the amount of $1106.25 with instructions that the claimant should pay the fee and I still have not received any reply from my correspondence asking for an explanation.

Buford Deel, P.O. Box 84, Birchleaf, VA—SS 228-44-2482, Sep. 1973.

The claim was approved by the Social Security Administration, Dept. of HEW, on 6-1-79. It was sent to the Department of Labor for payment which invoked the 80% rule. Other claimants whose claims were approved by HEW get full benefits.

Roger L. Underwood, P.O. Box 31, Whitewood, VA—OWCP 407-70-9008, Case 85-BLA-0221.

The Defense Counsel requested that the claimant be examined by Dr. John G. Byers. Dr. Byer's report was forwarded to the claims examiner on 11-1-84. The case was referred to the Office of Administrative Law Judges on 1-10-85. The exhibits were not received by me until 3-29-85 and they did not include a copy of the report of Dr. Byers.

There are numerous other records and actions that could be cited and some are more inconsiderate, but I do not know of anything that can be done at this time that will obtain any better results.

Mr. MURPHY. Thank you very much, counselor.

Attorney Winston.

Mr. WINSTON. Yes, sir; I'm Robert Winston, and I practice in Norton, VA.

STATEMENT OF ROBERT T. WINSTON, JR., ESQ., NORTON, VA

Mr. WINSTON. I've been representing black lung cases claimants since the law was initially put into effect. I represented the first cases under the Social Security Administration, and I thought they were slow. But, as a whole, Security handled the claims much faster than the Labor cases that were processed and decided by the Labor Department.

And, at this time, the slowness of the proceedings are really putting an undue hardship on the claimants. Instead of generalities, I think I can best make my point by giving you the procedural case histories. These are eight cases which I'm now handling, and these are among my oldest cases.

I'll use numbers instead of names, in order to protect the privacy of my clients. Now, the first case, the initial filing of this claim was March 18, 1974; that is 11 years ago. There was a denial by an administrative law judge of the Labor Department, back in 1976 and this claim was revived under the 1977 amendments.

There was another hearing, decision of denial, administrative law judge in 1981, July 1981. Appealed to the Benefits Review Board in August 3, 1981, and a decision was rendered July 25, 1984. In other words, it took 3 years for the Benefits Review Board to make a decision after notice of appeal.

That claim is now pending in the fourth circuit. I note that the man has died, but I'm carrying it on for his widow. It's been some 11 years since the initial filing.

Case 2, initial filing—this is a newer case, in March of 1979, and a hearing was held on this before the administrative law judge in 1981, decision of denial in April 1982. Now, that case was appealed to the Benefits Review Board in May of 1982, over 3 years ago, still pending before the Benefits Review Board.

Now, that case is pending some 6 years after initial filing, and that's probably faster than some of the others.

Case 3, application filed in January 1976. Fortunately, this man, initial determination in 1979, is drawing black lung. However, there was a decision awarding benefits in June 1982. The coal company has appealed to the Benefits Review Board, notice of appeal was in July 1982. That's still pending, nearly 3 years. Of course, the man is drawing it, fortunately, it's not decided; he doesn't know what the ultimate decision will be, and of course, if it's against him, he will have to return the money. That case has been pending nearly 8½ years, and he's one of the fortunate ones, because he's drawing his money now.

Now, I have two other cases that are fairly new, one of them, an application filed in 1980; request for a formal hearing, August 1980; still haven't had a formal hearing, and that's about 5 years from application and still no hearing before an administrative law judge.

And no benefits.

The other case 5, is a fairly new one. Claim filed in March of 1980; formal hearing requested March 1981; he's drawing no pay, and that's 4 years ago. Still no hearing, asked for a hearing over 4 years ago. Not drawing any money.

Now, here's an older one. This is a case that the claim was filed in 1970; first denial was in the Social Security Administration; and then he filed with the Labor Department, and there was a denial under the 1977 amendments in March 1979, and later, more evidence submitted, and a later denial in 1980. He's requested, in July of 1980, a hearing, and no hearing date is set as of now. And that's 15 years from the initial filing.

Still hasn't gotten a hearing before an administrative law judge.

Another case, first filed in 1970, he did have a denial by an administrative law judge at Social Security in 1974. This case was revived under the 1977 amendments. He requested a hearing in November of 1981. Still hasn't had a hearing before the Labor Department's administrative law judge. That's dated 4 years since his request for a hearing. This claim has been pending nearly 15 years, since 1970.

The man hasn't drawn a nickel.

Here's another one. This is a little bit younger. I think he had some claim filed around 1975; the Labor Department claimed it was filed in 1977. I got this case later; not initially. But he had a letter indicating insufficient evidence in 1980. Hearing requested September 1980, nearly 5 years. No hearing; no pay. Claim pending something over 10 years.

You'll note that there's been an abnormal delay in some of these cases, between request for hearing before an administrative law judge and when the hearing is actually held. In case 4, I requested August 27, 1980; no hearing yet. Case 5, requested March 1981; no hearing yet. Case 6, requested a hearing July 1980, no hearing yet. Case 7, requested November 1981; no hearing date, no hearing set. Case 8, request for hearing was in September 1980; no hearing date; no hearing held.

Now, that's before you get to the administrative law judges. The proceedings before the Benefits Review Board have also been very slow. Case 1, it was nearly 3 years from the filing until getting a decision.

Case 2, it was from May 1982, petition from notice of appeal May 1982, no decision yet.

Case 3, notice of appeal July 1982, nearly 3 years ago; no decision yet.

And the effect of this, particularly, is worse for the victims—the black lung victims. It's also made it hard for them to get attorneys to assist them.

A lot of them need attorneys to develop the years in the mines; to see that they have the proper blood gas study tests, breathing tests, to review the evidence and see what is lacking. And of course, a number of them have gotten benefits and awards because they had this assistance and they probably wouldn't have gotten it, had they not had the assistance.

Now, I personally, have stopped taking the claims unless I feel some special obligation, or unless there's some special circumstances. All lawyers like to be able to do something for their clients; when you have to tell a client that it'll be years and years before I could do anything for you, it's very discouraging.

And other attorneys have told me that they have stopped taking black lung claims. And it's difficult for a claimant to obtain an attorney and that's for several reasons. One of them is it's more difficult to win claims under the recent amendments.

A second is time and the frustration that it takes, I'm talking about 10 years, and some cases 15 years, a lot of the cases 5 years. It's discouraging, not only to me, I mean, it's discouraging to everybody involved.

Another important reason is most attorneys have office overhead, and they have to meet it. They can't tell their secretaries that you'll have to wait 2 or 3 years before you're paid. But that's the case with the attorneys. You have to wait, of course, until you win the case, but after that, it's long months and years before the attorneys get paid.

They put in their application for approval, which they must get before they can get the pay, and it takes months, sometimes years. I have noted in my prepared speech, the time of some of the cases. If you'll note in some of the cases, it takes about 2 years from the time you request approval until you get your pay.

Some cases have been longer than that. An attorney I know, who has also stopped taking cases, I told him I was coming to this committee. He said, well, you tell them this:

He says, "On Monday, I received an approval for fee" [He didn't receive his fee.] He said, "I requested approval of a fee back in 1981 and I'm just getting the approval." Of course, it'll be another 9 months or 1 year, probably, before he gets his pay. That's between 4 and 5 years. And this particular attorney is so situated that he can carry on in that he doesn't have that proportion; the fact is, he's quit taking them, but he doesn't have that proportion of them.

But that makes it hard for claimants to get attorneys to represent them, and they should be able to have us represent them, because a lot of them need attorneys to develop the evidence.

I think that the main problem we have, is what Shakespeare was talking about as the law's delay.

We hate to have to tell claimants that it may be years, but we have to do it. And I think if we can speed up the process, get more personnel to process these claims, get them hearings, see if the Benefits Review Board won't speed up the claims; that will go a long way.

Thank you.

[The prepared statement of Robert T. Winston, Jr. follows:]

PREPARED STATEMENT OF ROBERT T. WINSTON, JR.

I have been representing Black Lung claimants since the law was initially put into effect. The first cases were handled by the Social Security Administration. Some of those cases were slow but as a whole they were handled much faster than were the later cases that were processed and decided by the Labor Department.

At the present time the slowness of the processing of the claims and the slowness of the hearing and Appellate proceedings put an undue hardship on Black Lung victims.

I can best make my point by giving you the procedural case histories of eight cases which I am now handling. These are among my oldest cases. I will refer to the cases by number rather than by name:

Case No. 1

Original filing, March 18, 1974.

Denial by Administrative Law Judge, November 19, 1976.
Elected review, April 4, 1978.
Hearing before Administrative Law Judge, April 9, 1981.
Decision of denial, July 22, 1981.
Appealed to Benefits Review Board, August 3, 1981.
Decision of denial, July 25, 1984.
Case now pending in Fourth Circuit.

Case No. 2

Original filing, March 8, 1979.
Initial finding of eligibility, December 27, 1979.
Initial determination, April 21, 1980.
Referred to Office of Administrative Law Judges, June 30, 1980.
Hearing held, August 17, 1981.
Decision of denial by Administrative Law Judge, April 28, 1982.
Notice of appeal to Benefits Review Board, May 7, 1982.
Petition for review with brief filed, September 8, 1982.
Still pending before Benefits Review Board.

Case No. 3

Application filed, January 16, 1976.
Initial determination, on or about May 2, 1979.
Hearing before Administrative Law Judge, May 11, 1981.
Decision awarding benefits, June 24, 1982.
Notice of appeal to Benefits Review Board, July 15, 1982.
Petition for review mailed, December 21, 1982.
Still pending before Benefits Review Board.

Case No. 4

Application filed, June 5, 1980.
Claim denied, July 16, 1980.
Request for formal hearing, August 27, 1980.
Answer filed by coal company, September 12, 1980.
Inquiry letter, July 28, 1982.
Referred to Office of Administrative Law Judges, April 18, 1984.
No hearing set as of this date (nearly five years since request for hearing).

Case No. 5

Claim filed, March 18, 1980.
Claim denied, February 6, 1981.
Formal hearing requested, March 24, 1981.
Conference, June 12, 1981.
Letter of inquiry, October 17, 1982.
Referred to Office of Administrative Law Judges, July 16, 1984.
No hearing set as of this date.

Case No. 6

Claim filed, May 6, 1970.
First denial rendered by Social Security Administration, May 6, 1971.
Claim filed, May 05, 1973.
Filed with Labor Department, October 1, 1976.
Denial by Social Security Administration (under new law), March 3, 1979.
Labor Department letter indicating insufficient evidence, February 9, 1980.
Claim denied, May 19, 1980.
Formal hearing requested, July 10, 1980.
Referred to Office of Administrative Law Judges, August 31, 1983.
Additional X-ray report sent in, October 14, 1983.
Request for film by Labor Department and doctor instructed to transmit film, December 1983.
No hearing date set as of this date.
Claimant had 29 years in the mines.

Case No. 7

Claim filed with Social Security Administration.
Dneial by Social Security Administration, September 15, 1970.
Administrative Law Judge denial by Social Security Administration, June 18, 1974.

Appeals Council denial, October 11, 1974.
Labor Department denial (reconsidered under 1977 Act), December 5, 1979.
Letter affirming initial finding, October 21, 1981.
Formal hearing requested, November 2, 1981.
Letter of inquiry, March 17, 1983.
Conference with Labor Department, representative, June 24, 1983.
Recommended denial, March 16, 1984.
Hearing again requested, March 20, 1984.
Claim sent to Office of Administrative, Law Judges, July 16, 1984.
No hearing date set as of this date.

Case No. 8

Some claim filed around 1975.
Labor Department claim filed, May 25, 1977.
Letter indicating insufficient evidence, July 7, 1980.
Claim denied, September 11, 1980.
Formal hearing requested, September 19, 1980.
Claim sent to Office of Administrative Law Judges, August 26, 1983.
No hearing date set as of this date.

You will note that in some of the cases there has been an abnormal delay between the time of request for a hearing before an Administrative Law Judge is filed and when the hearing is actually held.

In Case No. 4 a request for a hearing was filed on August 27, 1980. A hearing date has not been set as of this date.

In Case No. 5 a request for a hearing was filed on March 24, 1981. A hearing date has not been set as of this date.

In Case No. 6 a request for a hearing was filed on July 10, 1980. A hearing date has not been set as of this date.

In Case No. 7 a request for a hearing was filed on November 2, 1981. A hearing date has not been set as of this date.

In Case No. 8 a request for a hearing was filed on September 17, 1980. A hearing date has not been set as of this date.

The proceedings before the Benefits Review Board have also been very slow.

In Case No. 1 it was nearly three years from the filing of a notice of appeal to the Benefits Review Board until getting a decision.

In Case No. 2 a notice of appeal was sent to the Benefits Review Board on May 7, 1982 and the petition for review was filed on September 8, 1982. This case is still before the Benefits Review Board with no decision.

In Case No. 3 a notice of appeal was sent to the Benefits Review Board on July 15, 1982 and the petition for review was filed on December 21, 1982. A decision has not been received.

I have now stopped taking Black Lung claims unless I feel some special obligation to the claimant or unless there are some special obligation to the claimant or unless there are some special circumstances. Other attorneys have told me that they have also stopped taking Black Lung claims. It is now beginning difficult for a claimant to obtain an attorney.

This is for several reasons. One of the reasons is that it is more difficult to win the claims. Under recent amendments the standards of eligibility have been raised so that a number of long-term miners and worn-out miners do not meet the blood gas or the breathing qualifications. A second and important reason is the length of time that it now takes to handle a Black Lung claim and to get some ultimate decision. Another reason that attorneys are turning away from these cases is because of the length of time it takes an attorney to obtain authorization of a fee and to be paid for his services.

I list the time data on six of my cases showing the time it took from the sending of the petition for approval of a fee until the fee was received by me. This was after the cases were won:

Case No. 1

Petition for approval of fee of $750.00 sent to Deputy Commissioner Theodore Kotowski, Johnstown, PA, September 28, 1982.
Payment received, March 19, 1984.

Case No. 2

Petition for approval of fee of $2,691.48 sent to Deputy Commissioner Kenneth Moxley, Washington, DC, June 22, 1982.
Payment received, June 18, 1984.

Case No. 3

Petition for approval of fee of $1,497.47 sent to Deputy Commissioner Kenneth Moxley, Washington, DC, June 22, 1982.

Payment received, June 22, 1984.

Case No. 4

Petition for approval of fee of $975.00 sent to Deputy Commissioner Wallace Robinson, Charleston, WV, October 20, 1982.

Payment received, May 16, 1984.

Case No. 5

Petition for approval of fee of $360.00 sent to Deputy Commissioner Robert D. Lotz, Washington, DC, May 31, 1983.

Payment received, July 11, 1984.

Case No. 6

Petition for approval of fee of $1,475.00 sent to Deputy Commissioner Robert D. Lotz, Washington, DC, May 25, 1982, and petition for approval of fee of $750.00 sent to Deputy Commissioner Robert D. Lotz, Washington, DC, July 9, 1982.

Payment received, November 26, 1984; and payment received, September 7, 1984.

You will note that in Case Nos. 2, 3 and 6 that it was approximately two years in each of these cases before payment was received.

Attorneys have considerable business overhead and this slowness in payment dissuades them from taking these claims.

It is my recommendation that Congress provide sufficient funds to the Labor Department to enable them to hire sufficient personnel to process these Black Lung claims in a reasonable period of time. This is necessary in order to give Black Lung victims the relief which they need, and which Congress has intended for them.

Mr. MURPHY. Thank you very much, counselor. Attorney Browning.

STATEMENT OF LARRY BROWNING, ESQ., LEBANON, VA

Mr. BROWNING. Gentlemen, these are some suggestions that I thought of that might help the process that we're faced with.

I've noticed that the Department of Labor is spending a considerable amount of time even to process some claims which, in my opinion, should not be processed. It makes no sense to process a working miner's claim, because no administrative law judge is going to allow disability benefits for a claimant who is working.

Those claims should be separated; they should be held in abeyance until it's time to process them. You're not doing the claimant in that particular case any favor by pushing his claim through to a hearing where it would be denied.

The other area—and it should be viewed with caution—the present regulations provide no basis to settle claims. Black lung regulations are one of the few areas I know of that claimants are not allowed to settle a claim. Car wrecks, criminal claims, anything, in most areas you have settlements.

It should be viewed with caution because there is room for fraud. Claimants could be pushed into settlements. At the same time, what I would propose, and it would speed up the claims, many of these claims are in the grey area, but settlements that would be approved by the Labor Department under standards set by the Labor Department. For example, the Virginia Industrial Commission and their workers compensation statutes, do allow for settlements that are approved by the Chief Deputy Commissioner. It's a very strict procedure. It does prevent a lot of expense, such as depositions, litigation, and the claimants come out, in my opinion, further ahead than if they went to a hearing.

As my colleague averred in his written remarks, if all we're going to do is speed up the denial process, then we're wasting our time here today.

Another area I think would definitely help all parties concerned, would be the establishment of medical panels. The present system is a joke. The Deputy Commissioner will send the claimant for a very brief examination after his claim is filed. The doctor will get a form; will handwrite out the form; if you can read it, you're doing great.

Examination is brief and no one pays any attention to it.

Why not establish medical panels in given areas; testing would be consistent, fair. You would have breathing studies conducted in a safe manner, and with results that you could use if you got, when and if, you got to a hearing. Blood gas studies would be done in an acceptable manner.

The present system now, where the claimant has to go everywhere to build up his evidence, is time consuming, and it's very costly. I do feel that a medical panel of fair-minded physicians would do a lot to, not only speed up the program, but we may get better results at considerable savings to the claimants.

Can you imagine Mr. Blankenship that just testified, if he was told by his attorney, he would need $500 to go for a detailed black lung examination. Can you imagine what Mr. Blankenship would have to go through to raise that kind of money?

But, yet, he's going up against the insurance carriers who can afford it, and the Labor Department has not done their work because their use of these insufficient brief examinations to begin with.

The next area would be hearings. We view the substitution or use of substitute judges as a bad solution because all you're doing is inviting errors, and the cases will be appealed to the BRB, and then before a circuit. If we are to have a Black Lung Program, then give us judges who know the regulations and they can conduct a full hearing.

I would also recommend that judges be placed in this area, because out of a 5-day work week, if you're going to spend 2 days on an airplane, that leaves you only 3 days to have hearings. And I dare you to get much work done on an airplane.

The Social Security Administration used to have, when they were in the program, they used to have judges that would be stationed at least in the area. You could get motions ruled on; you know where the file is; you know what's in that file; you could get some hearings done.

Now, we do have Federal buildings, we have college campuses, we have many rooms that we could hold hearings in. What we need are full time judges in this area to get rid of this backlog. We do not need substitute judges flying in whose only desire is to get back to Washington, or Cincinnati, where they came from. And, yes, we've had that happen. We've had a hearing in the past 2 or 3 months where a temporary judge came into the area.

The insurance carrier attorney made a brief motion for another examination; the administrative law judge took it under advisement and continued the hearing for which the claimant had been waiting 2 or 3 years. Think of the cost involved in that brief, so-called hearing, for all parties.

That concludes my remarks. Thank you.

[The prepared statement of Browning, Morefield & Schelin, P.C., follows:]

PREPARED STATEMENT OF BROWNING, MOREFIELD & SCHELIN, P.C., ATTORNEYS AT LAW

I would like to thank the House Subcommittee for allowing me this opportunity to submit comments regarding the procedural aspects of processing Federal Black Lung claims. My name is Gregory R. Herrell and I am an associate with the law firm of Browning, Morefield and Schelin. Our firm currently engages in, and has engaged in for some time, the representation of individuals in regards to their Federal Black Lung claims. It is a practice which we have sharply curtailed during the past few years.

The main reason for not taking more Black Lung claims is money. The government cannot expect a lawyer to represent a claimant for many years for nothing. Proper representation of a Black Lung claim involves frequent review of the claim, detailed claimant interviews, attendance at depositions and hearings, and familiarity with the latest decisions from the Benefits Review Board and the U.S. Courts of Appeal. Only if the claimant is successful can the attorney obtain compensation. The increasing delays in processing and the more stringent regulations and rulings by the Benefits Review Board has lead us to further reduce our representation of claimants in this area.

The Administration with congressional help could certainly institute measures to hasten the processing time. Such measures could include additional Administrative Law Judges as well as support personnel. Administration has recently borrowed Administrative Law Judges from other agencies to help with the backlog. This effort while commendable has the effect of further delaying processing because of the Judge's unfamiliarity with the law and regulations on Black Lung benefits. The Congress may also wish to consider allowing claimants to obtain legal representation without regard to their chances of winning or losing. Legal fees could still be monitored by the Department for their reasonableness. All of these devices would be helpful but cannot resolve the primary difficulty which faces the coal miner.

A primary difficulty remains the difficulty in obtaining benefits given the present law and regulations. Permission to charge legal fees without regard to result and additional Administrative Law Judges would hasten the process. But what is the end result? Should a coal miner with limited income, usually Social Security Disability, pay thousands of dollars to an attorney to represent him on a Black Lung claim where the result is probable denial? In addition to legal fees, the miner must obtain medical documentation to prove his impairment. This documentation costs a great deal of money. A regular Black Lung examination including chest x-ray, ventilatory tests, arterial blood gas study, and physical examination normally costs approximately $500.00 or more. A properly documented Black Lung claim would normally include anywhere from $1,500.00 to $2,000.00 worth of medical bills. In the unlikely event that a claimant wins his claim after spending his meager resources for medical documentation, he would find that it would likely be offset by his receipt of Social Security benefits. If the end result of these hearings is to expedite the denials of Black Lung claims by allowing the miner to spend money which he does not have for more documentation, then we will accomplish very little by meeting here today.

Mr. **MURPHY**. Thank you very much, gentlemen. You've certainly provided us with a great deal of insight and recommendations. We do appreciate that.

Attorney Winston, you had indicated that when you handled them before the Social Security Administration, the claims seemed to move faster. Can you give us a date when you first noticed in your caseload when the backlog occurred?

Mr. **WINSTON**. Well, I judge ever since the first Labor Department hearings, compared with what we have now, they were comparatively fast. I'd say after the 1977 amendments.

Mr. MURPHY. Some time after the 1977 amendments started.

Mr. WINSTON. Started appealing the old cases. Yes, sir; that's my impression.

Mr. MURPHY. Now, Mr. Browning, the medical panel, do you suggest that that be a permanent panel, or that that be selected on a case basis, with each side selecting a panel, how would you?

Mr. BROWNING. A permanent panel. I think if you leave it to the attorneys to agree, we would never agree. It should be a permanent panel selected by the industry as well as the union, private attorneys, so you'd get a fairminded panel.

I know it's inappropriate, but I would like to ask a question of the committee at this time, if I may.

Perhaps they would ask one for me. The question may seem paranoid, but I think there's a basis for it.

Does any of the committee know of any pressure put on the Department of Labor to slow these cases down? The question is not paranoid, I don't believe, because, last year, as the committee may know, 500-and-some Social Security judges filed suit in Federal court over quotas that they stated were being placed on them by the current administration.

And I'm wondering if they're doing it in the Department of Labor?

Mr. MURPHY. We intend to find out. I've already discussed the matter with a chief administrative law judge in Washington, who is assigned to the Department of Labor. We're going to subpoena him, and we're going to have DOL people come in, ALJ's come in, and that's why we're trying to get case-by-case histories of the delays of 3 years; where the delays are.

I might say, we find the delays between the time you file and actually get a hearing are long delays. The next is the Benefits Review Board. Cases are languishing there for years, and we intend to have the people come up from Newport, and maybe we'll provide some answers for you, counselor, when we complete our hearing in Washington.

Mr. BROWNING. Thank you, sir.

Mr. MURPHY. Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman. I want to join with you in thanking the witnesses for their excellent testimony here today. I think it's very helpful to the subcommittee's work.

I'd like to ask a couple of questions with respect to your opinion on the effectiveness of the actions taken by Congress in trying to reduce the backlog of cases pending in the Department of Labor and shorten the time for decisions.

The Charleston office, where preliminary determinations of eligibility are made, has now received eight new staff positions and the Director of that office has indicated an intention to reduce to 180 days, by September of this year, the time within which preliminary determinations of eligibility will be made. He then has announced an intention to shorten to 90 days the time for referring cases onto the Office of Administrative Law Judges, where appeals are requested either by the claimant or by the responsible operator.

In your opinion, is that a satisfactory timeframe for handling cases in that particular office?

Mr. WINSTON. Yes; if they'll do it. I mean, that compares favorably with 4 or 5 years.

Mr. BOUCHER. It certainly does. But you would all agree, then, that that would be an appropriate timeframe for handling cases on that level of review?

Mr. WINSTON. Yes, sir.

Mr. BOUCHER. If he'll do it?

Mr. WINSTON. Yes, sir.

Mr. BOUCHER. Let's move on to what is obviously a more serious problem that is the backlog of cases that the Office of Administrative Law Judges have. That backlog is now 21,000 cases, which I find to be an absolutely astounding number. The General Accounting Office has estimated that, with current staffing and current procedures, it could take anywhere between 9 and 35 years for that office to work down this backlog to acceptable levels.

We have heard testimony today from witnesses indicating the review time is 5 years or more, just at this level of review alone. I don't really know what the answer to that is, absent the provision of new staff for the office. I think that the clear conclusion is that more staff is going to be necessary.

I wonder if you would have any thought or any comment concerning the proposal that those administrative law judges who are presently working for the Department of Labor, and handling Longshoremen's claims, could perhaps be placed on loan to the other side of the Department where black lung claims are being adjudicated?

We have statistics that demonstrate a strong rationale for doing that. There are only 6,000 longshoremen's claims pending at the present time, and there are 63 administrative law judges that handle those 6,000 claims.

By contrast, there are only 25 administrative law judges to handle the 21,000 black lung claims. There are three times as many black lung claims, and less than half the number of law judges to handle it.

And, yet, the Office of Personnel Management has said that the law judges assigned to the longshoremen's cases cannot handle black lung claims. Is there any sufficient difficulty in handling a black lung claim, that these administrative law judges could not be trained to handle those cases, and in doing so, help to reduce the backlog?

And it's my opinion that the administrative law judges from the longshoremen harbor workers group, have been very efficient; they move the hearing along; and they don't dillydally. I think that's the type of service that we have to have.

Somebody that's willing to get to the meat of the problem and move the case along. I don't see any problem with that.

Mr. WINSTON. I would agree with his comments, Congressman.

Oh, when the Social Security Administration was faced with a big backlog, back in the early 70's, they hired a number of temporary administrative law judges, at least temporary at that time, set up an office in Bristol. And they had a number of judges to just handle black lung cases, and they reduced that backlog pretty well.

We just had to go to Bristol, and we knew who we were going to and they took care of it. And I think something like that would help. Get a bunch of temporary judges, put them in Bristol, or some local place, and let them work on the cases.

Mr. **Boucher**. Mr. Browning, I've noticed some hesitancy in endorsing that concept in your original testimony.

Mr. **Browning**. I would fight the idea of a temporary judge because, one, I had to deal with those same temporary judges under the Social Security. One of their main—well, this is paranoid—but their main desire was to become a permanent ALJ.

In other words, I questioned their complete independence. When you're trying to get on the permanent staff, you do not become a maverick.

Mr. **Boucher**. It appears to me that some additional staff is going to be necessary. Congress, so far, has addressed the levels of review below and above the administrative law judge level, but has not so far, addressed staffing for the administrative law judge level, itself.

That's where the enormous backlog is today. It's apparent that that's where our attention is going to have to focus.

Mr. Robinson.

Mr. **Robinson**. Mr. Winston, and I both have been in the Washington office when they've had a claims examiner and a Deputy Commissioner and a number of personnel. Now, it's my understanding that all of those claims in that office were farmed out to districts or regions, and my question is, what happened to those individuals down there on Third and Constitution Avenue?

They had a whole host of people in there and what are they doing, and are they helping take up the slack in this thing?

Mr. **Winston**. I cannot see why they cannot take some of the extra ALJs they currently have, and put them into the Black Lung Program. I mean, I don't see why we're being ignored.

Mr. **Murphy**. I agree with you. I think that's partially the problem. Obviously they can devote some of the time of these 63 ALJ's doing longshoremen's claims, to the Back Lung Program, that would help.

That may not be a total answer but I think that's a positive first step.

I, for one, will be recommending to this subcommittee that it consider favorably whatever action may be necessary to see that that occurs.

Let me ask one further question of you with regard to the third level of review, the Benefits Review Board. Last year, Congress adopted legislation which adds two new members to the Board, expanding from three to five members.

It also authorized in funds, 53 new positions, of which only 23 have been filled. That Board presently has a backlog of 6,000 cases. We've heard from witnesses today that the review time can be several years, at that level of review, alone.

Do you believe, or do you have any comment with regard to the sufficiency of the action Congress took last year as a way to address the backlog in that review time?

Mr. **Browning**. I question the attitude of the BRB with the present people serving on it. I think it will take more than an act of Congress to get them moving. The delay serves their purpose, and until they're ordered to move, I don't think 40 more staff members will help.

Mr. **Murphy**. Mr. Winston, do you concur?

Mr. **Winston**. Well, they sit in panels of three and I say, the more personnel you give them, the more panels they can have and the faster they can get to that backlog. That's my thought. I mean, this is serious and important to all of these claimants, and the cost of additional members for the Benefits Review Board is very small, compared with the delays these thousands of people are having in getting their claims.

Mr. **Murphy**. Mr. Browning, I was very interested in—I'm sorry. Did somebody else want to comment?

Mr. **Robinson**. I'd like to mention something where I concur with Mr. Winston. That when you have a claimant that has been paid, or his case is approved, and it's appealed, he is reluctant to go out and use this money because if he's a conscientious person, he doesn't want to be faced with paying it back, as some have been directed to do.

And specifically I noted in my list of cases, a client that was 74 years of age. Now, the case was appealed when the Department of Labor physician found the pulmonary function studies to be valid, and they were qualifying studies. Of course, that case is appealed, that loads down the system.

I recently had one in Big Stone Gap, similar circumstances. The man is all concerned; they need the money but they're concerned about whether to use it. It was appealed, and if they're going to appeal these cases to create charts on the wall, saying we've got this many, this many, this many, so that somebody's going to be a supervisor, or a director, then its a catch-22 situation, you know, like a dog chasing his tail.

Mr. **Boucher**. I think that problem points up once again the need to reduce the very lengthy review time of these cases. The miner that is receiving benefits pending some decision being made, has an enormous burden imposed on him if he's told, after that decision is made, 4 years later, that he has to repay a sum of $10,000 or more. I've seen cases that have come in to our constituent offices that really involve sums far larger than that. I can appreciate the burden that is imposed on the miners under these circumstances.

Let me, Mr. Chairman, if I may, just make one additional point, and that will conclude my questioning of these witnesses.

I am concerned, as you are, about the fact that it takes 2 years or more oftentimes to have your fee petitions approved. I understand that the capital burden that imposes on you, as businessmen and practicing lawyers, but I also think it has a dampening effect on the ability of black lung claimants to get good legal counsel. Many lawyers are simply not going to take cases if they know that their fees aren't going to be approved for a very lengthy period of time.

When you bill the length of time it takes to review black lung cases, and then add 2 years on top of that, which is the time it takes to get your fee petition approved, you are 10 years away, in some cases, from the time that you started the case, until the time that you receive some compensation.

I can readily understand the reluctance of lawyers, given that situation, to undertake representation of black lung claimants. I think it's important that we get those review times decreased and I believe all will benefit as a result.

Mr. ROBINSON. There's one other factor concerning those fee petitions. I've had time excluded because I did not furnish them copies of my letters to claimant's doctors. And I've had time excluded for the time that I talked with the claimant's doctors. Now, I don't see how a lawyer can represent a client and not be in communication with a physician, and they have excluded this time, and then I went ahead and appealed the case in 1980.

I got a favorable decision from the Benefits Review Board in 1984, but it went back to the Deputy Commissioner and I've not heard anything about what they're going to do. If I had to take the stand and testify under oath, it's my firm conviction that they have been very subtle in trying to drive the attorney away from the practice. That's what I believe.

Mr. MURPHY. Thank you, Mr. Robinson. Mr. Perkins, you have questions, Mr. Perkins?

Mr. PERKINS. I've not a whole lot of questions.

I practiced law, two counties away from here, for a number of years. I didn't take black lung cases, couldn't make any money out of it. Only time my firm took them is when we had a workers compensation case, State case, in conjunction with it. We had a pretty decent case.

Starting from the assumption that there is, at least one of you has voiced the opinion, some sort of concerted effort to deny the black lung benefits to individuals based upon a preconceived administrative notion. It strikes me that we start from there, and then we have a combination of things.

We have too few judges, as we've been talking about here all day. The second thing is, we have an administration that is opposed to the concept of it to begin with. And what that results in is claims that are delayed any way possible and you talk about the different sort of incentives that are brought within the system to not, in fact, speed the claims along; not, in fact, allow favorable decisions.

I think we had the same sort of thing in the Social Security Administration; though, in Social Security, certainly in disability cases, you get a lot quicker action, and you felt you could make a little bit of money on that.

I certainly concur with what you just said about having your hours cut down and time excluded. That happened to us on a number of occasions. It simply isn't worth it for a private attorney, today, to take a Federal black lung claimant. We had no one at the conclusion of my practice in that county who took any, and this is by no means an exception; it's rather the rule. So I certainly concur with what you've said in those regards.

I think the problem, as we've seen, is the recipient, the one who's out there, the black lung claimant's the one who's bearing the brunt of all of this, and, gentlemen, don't you think that the first thing—I don't know—if we pass a law to tell them to speed the claims up; that's fine, but they're not going to do it. I'll believe it when I see it. I was always one of those skeptical sort of people.

But, at the same time, if they speed the claims up, the denials—and we're down to what, a 3-percent rate of acceptance right now, down from somewhere around 30 percent 4 years ago.

That's no accident. And I think that when you put those things in conjunction, if you're mathematical you could figure there's another variable that's going in there. Well, I have my suspicions what that variable is.

But, given these things, it strikes me that the best thing we can do at this time, is a couple things.

One, try to address this problem on a piecemeal basis; and I think we have to do that. Try to get some new administrative law judges; whether it's on a temporary basis, and you highlighted the problem with temporary judges, I think, quite effectively, but we have to get judges from some other source to try to get rid of this backlog. Do you all concur with that?

WITNESSES. Yes.

Mr. BROWNING. Yes, sir; but like Mr. Boucher stated, they're there already; just not being worked and I still see no reason for——

Mr. PERKINS. You're talking about 63 ALJ's?

Mr. BROWNING. Yes; and I still see no reason why we cannot have judges stationed in this area.

Mr. BOUCHER. I agree.

Mr. MURPHY. I know with Social Security, you have them stationed generally, and I agree with that. That's perfectly correct.

Mr. WINSTON. We have four judges in Kingsport, which is just a short drive from here, that's in Social Security.

Mr. BOUCHER. So, you think that we should have judges, stationed in this area? I think we all agree with that, is that right?

Mr. WINSTON. Yes, sir.

Mr. PERKINS. And then after that, I guess we'd have to elect us a new President and a new administration in Washington, that have a little different attitude if we're going to create—do away with administrative problems.

Mr. BOUCHER. That's something we'll be handling about 4 years from now. In East Kentucky, we did it last time; we're going to try harder next time.

Mr. MURPHY. Will the gentleman yield for a moment?

Mr. BOUCHER. I most certainly will.

Mr. MURPHY. Thank the gentleman for yielding. I would simply ask the gentleman not to require these witnesses to answer that question because I happen to know that they're not all of one political faith.

Mr. ROBINSON. Well, that's, still our duty. I think that when somebody's wrong, we should point out that they're not doing their homework.

Mr. PERKINS. I certainly concur with that; and I intend to join with you in trying to preach to the people that this is indeed a problem that we've been having these last 4 years. That's all.

Mr. MURPHY. Thank you very much gentlemen, for your excellent testimony, and we appreciate your being with us. Thank you.

And the final panel of witnesses we have to bring before us is Mr. John Kennedy, president of the United Mine Workers of America, district 28; Attorney Gerald Sharp, who's an attorney with the UMWA, district 28; and Mr. Hobart Honicker, State director of the UMWA, district 28.

Gentlemen?

Mr. **Murphy**. Oh, Don McCamey instead of Mr. Honicker. Mr. Kennedy, you may proceed.

STATEMENT OF JOHN KENNEDY, PRESIDENT, DISTRICT 28, UNITED MINE WORKERS OF AMERICA, CASTLEWOOD, VA

Mr. **Kennedy**. First off I want to thank you, Mr. Chairman and your fellow members for allowing me to appear here today.

My name is John Kennedy, I'm president of district 28, United Mine Workers of America, P.O. Box 28, Castlewood, VA.

In beginning, this country depends largely on coal for energy needs and men and women of this country mine that coal to supply those needs. And as a result, they work underground in dusty areas, and above ground in dusty areas. Anywhere coal is mined and the place where it's put in the railroad car for shipping, there's dust. And those people are very much exposed to that dusty area and place of work.

This country is capable of sending people to the Moon and bringing them back to Earth, but they have a lot of trouble recognizing and dealing with the problem that this Nation's coal miners have in getting their rightful benefits that belong to them.

In one stage or other there's about 25,000 backlogged cases on black lung. Those cases are being handled at a rate of about 6,000 per year. The United Mine Workers' position is that that's ridiculous and inexcusable. In that kind of ratio, there will be people that will never get, never draw their benefits that rightfully are theirs and they rightfully deserve because they'll pass away before it is ever determined that they are to draw the benefits.

Another place that bothers me very much is the widows and their dependents that have a problem with collecting black lung after it's been determined that the breadwinner miner did have black lung, passed away before he received any benefits, and now, she has to prove he died from the disease of black lung. Black lung is a disease that never gets better and only gets worse. She is bogged down with the problem of having to prove that he died from that disease.

That means an autopsy and many slides have to be furnished. We do have a State and Federal program to go through that requires proof after proof after proof. It's very expensive to anyone, whether it be the widow of a coal miner or whether it be the coal miners themselves. In some cases as high as 15 different x rays proving one doctor after another, one proof after another, that the individual does have black lung.

The problem is, in my opinion, and I do think there should be and must be, something done on the way that the cases are handled today, either they don't have enough administrative law judges or they don't have ALJ's in the places where they can hear these peoples' cases within a reasonable time.

With the present procedure, many unnecessary x rays, as I was referring to, are required of coal miners in order to prove their case. One other thing that I want to point out, a requirement of the present law as I understand it, you have to have a responsible operator to point to. Many coal miners that have the dreaded disease of black lung don't have a coal operator in operation today to point to because they've gone out of business for one reason or another. I feel that the payment to black lung should come from the coal operators, from all coal operators. Put the money in a pool to be paid from that one treasury to the victims of black lung, then that would resolve a coal company taking their individual victims to court to prove that they didn't have black lung, while we're trying to prove over and over that they do have it.

Mr. Chairman, I know we've heard much from both panels before us, and they're the same things that we hear each day from coal miners that come into our office, see our attorney, have us try to set up meetings for them. Listen to the panel just before us, the attorneys in this area will not take the cases for people that are really victims and would be probably entitled to black lung payments, but because of all the hassles, the long time waiting for their pay, they will not handle black lung cases. That puts a big load upon the United Mine Workers. We have an attorney which is supposed to have been here today, but due to his vacation starting he just gave his testimony in writing and he's not here. But he is overloaded with State and Federal black lung cases. People will not take them that have a private practice, they know the United Mine Workers is not going to turn a United Mine Worker down, so he's overloaded with cases. He doesn't have the time to handle it, and he tells me, not only one time but over and over, of the problem he has of getting cases scheduled before an administrative law judge. A lot of his clients die, and some of them are just giving up on him, on the system. Some of them are even saying that our office, the United Mine Workers and their attorney, is dragging its feet.

But it's, I believe, a proven fact where the problem is with getting the cases before—to a hearing. We don't have the law judges to hear them, set them up for them, and also, the long process of x ray after x ray, blood gas tests that they have to go through, not just one time, but over and over. They have to prove that they have black lung, and I really think it's inexcusable.

So with this I thank you for your time, and the opportunity to hear me out. It's of necessity to the coal miners.

Mr. MURPHY. Thank you very much. Mr. Kennedy. Mr. Don McCamey.

STATEMENT OF DON McCAMEY, VICE PRESIDENT, DISTRICT 28, UNITED MINE WORKERS OF AMERICA, CASTLEWOOD, VA

Mr. MCCAMEY. Mr. Chairman, Congressmen, distinguished guests, and fellow citizens.

I am Don McCamey. I'm a third generation coal miner. I'm vice president of district 28, United Mine Workers of America, and I am a citizen of the United States of America; the greatest and the grandest nation on earth, and I have the opportunity to speak today for coal miners and for all the above I consider myself blessed by my Creator.

I began my mining career in 1955 after returning to civilian life from our Armed Forces and since that time I've either been a coal miner or have been in my present position with the United Mine Workers of America. I want to thank you today for this opportunity for me to come before you and speak on behalf of all coal miners.

My father worked in the coal mines over 41 years, and over those years he, and countless other thousands of coal miners contracted pneumoconiosis, a disease which for many years, went unrecognized in this Nation. It was unrecognized because people chose not to see. There's a saying which goes something like this, "There is none so blind as those who will not see." That was the plight in which the coal miners of this Nation found themselves until the late 1960's. Beginning about Christmastime in 1969, coal miners began filing claims for black lung benefits. My father signed up in January 1970, and waited 6 years and 1 month before receiving any benefits. Countless other thousands have filed claims, but they've passed from this life, and many of them desperately needing care that they could not afford while going through the slow and arduous process of Government redtape.

During the 1970's I had the privilege of going to our Nation's capitol to lobby for a better black lung law. I experienced things there that I think I can never forget in this life. Several of our disabled coal miners of long years experience in the mines, went with us on those trips and many were the times at night as we sat in our hotel room that those brothers could not breathe while lying in their beds. We put them up on the side of the bed and beat them on the back until they could dislodge the obstructions in their lungs, and bring forth blood and parts of those lungs.

This is a great Nation and I'm proud of it, but that does not mean it's perfect. Our Nation prides itself upon its judicial system, and in many cases permits criminals to go free because they were not afforded a speedy trial. Let me pose this question to you. Should the common criminal who is indebted to society because of their unlawful acts be acquitted and set free to prey upon society again and again when at the same time the hard working coal miner who has risked his life under the mountains of this nation, combating the fear of a falling roof, of a mine explosion, or the day-to-day exposure to dust which will eventually choke off the oxygen to parts of his body and slowly but surely strangle him to death over a period of years, is denied a timely hearing in his attempt to be reimbursed for this terrible occupational hazard?

I've heard it said that "Justice withheld is justice denied." Nowhere else, I believe, could this statement be more aptly applied. For many of our coal miners who have very few years or months or even days to live because their lives are cut short because of pneumoconiosis will depart this life with their claims still caught in the maze of bureaucratic redtape. For them, justice has been denied.

When my father filed for black lung benefits in 1970 it took 6 years and 1 month to completely process his claim. Our attorney, Gerald F. Sharp, who handles a multitude of these claims, advises me that the average time now is at least 5.9 years. It appears that in the 15 years plus that have elapsed since the black lung law became effective, very little has been done to expedite the processing of these claims.

After this Nation made a commitment to put a man on the Moon it took less than 15 years to accomplish this extraordinary feat. I ask you, our Representatives, why in 15 years can we not cut through the bureaucratic redtape that denies our fellow citizens and our fellow coal miners justice under the law which recognizes the timeliness of an issue?

I want to thank you very much for your kind attention. I know that in times past you have taken your time, as our Representatives, and as representatives of your constituents to listen to our petitions. When this Nation put a man on the Moon it was not a life and death matter, but what we're asking and talking about here today is a life and death matter. Let's see that coal miners who have pneumoconiosis receive the benefits they are entitled to while those monetary benfits can still help to relieve at least a part of their suffering.

I thank you, Gentlemen.

Mr. **Murphy**. Thank you very much, Mr. McCamey. Mr. Don Wallace.

STATEMENT OF DONALD WALLACE, FIELD REPRESENTATIVE, DISTRICT 28, UNITED MINE WORKERS OF AMERICA, CASTLEWOOD, VA

Mr. **Wallace**. Chairman Murphy and fellow committee members, I am Donald Wallace, field representative for the United Mine Workers of America, district 28, located at Castlewood, VA.

I would like to take this opportunity to thank this congressional committee to allow me to appear before you today. There is not a day that goes by at the district office that a miner does not stop by with a problem concerning his or her benefits. I have had several conversations with our members who are suffering from the disease known as black lung.

I'd like to share with you three cases which illustrate the time involved in the lengthy procedure now required to settle a black lung claim and some of the consequences often suffered by our membership when these cases are finally settled.

Mr. X filed his claim for benefits under the act on March 25, 1977. His last coal mine employment was in December 1976. On January 21, 1980, he was informed that the Department of Labor had determined, based on the medical evidence of record, that he was totally disabled by coal miners black lung and ordered the last coal mine employer to pay benefits commencing in March of 1977. The operator refused and requested a hearing before the Office of Administrative Law Judges. Because the operator had refused payment and the Department of Labor had found eligibility, payments were instituted by the Black Lung Disability Trust Fund pursuant to 20 C.F.R., section 725.522. Payments by the trust fund continued through April 30, 1985.

On June 7, 1984, Mr. X's case was finally heard by an administrative law judge. On April 24, 1985, the administrative law judge denied Mr. X's claim. On May 20, 1985, Mr. X got a letter from the Department of Labor informing him that he had been overpaid $46,331.67 and that it was the Department's policy to collect overpayments when the administrative law judge determined they were not entitled to the benefits. Mr. X was asked to repay the entire amount within 30 days. The case is currently appealed to the Benefits Review Board.

Mrs. Y is the widow of a miner who last worked in November 1978. The miner filed his claim for benefits on December 13, 1978. The miner died on April 14, 1979 and on November 5, 1979, the Department of Labor initially approved the claim. The coal operator contested liability, but on February 7, 1980, the Department of Labor affirmed its earlier finding of eligibility and payments were instituted to the widow by the Black Lung Disability Trust Fund. On April 30, 1982 the administrative law judge who had been assigned the claim denied benefits. The widow's checks were immediately stopped, leaving her substantially without income and she received a letter from the Department of Labor asking her to repay $12,114.80. The case was denied on appeal.

Miner Z filed his claim for benefits June 15, 1979. He had labored for an excess of 42 years in our Nation's underground coal mines. His claim was approved by the Department of Labor and after the coal operator contested his eligibility for benefits, the Disability Trust Fund commenced benefit payments on May 1, 1980. In May of 1983 the case went to trial, and on August 8, 1983, the administrative law judge denied benefits. On August 19, 1983, Mr. Z received a letter from the Department of Labor telling him his benefits had been terminated and requesting that he return the $16,791.80 that the trust fund had paid on the claim. The case was appealed to the Benefits Review Board and is yet to be decided. Mr. Z died waiting for his decision on appeal, and his widow is still waiting.

I am very concerned about our membership who, through no fault of their own, are asked to pay back moneys which have been allotted to them by the Black Lung Disability Trust Fund as directed by the Department of Labor. I'm asking that this Congressional Committee work for legislation that would free these miners and their families from the burden of trying to repay moneys which they felt they were entitled to.

In closing, I feel that more administrative law judges would help speed up the processing of pending and future black lung cases. It is imperative that action be taken immediately to improve the situation that today's miners have to face.

Thank you very much for your time and for any efforts you put forth on behalf of the men and women who are suffering because of the lack of expediency in our system.

Mr. **Murphy**. Thank you very much, Mr. Wallace. All three of you have made very impassioned and legitimate pleas for your coworkers. I do appreciate that.

May I ask you, Mr. Kennedy, or if any of you know, how many claims are now pending in your district 28 office?

Mr. **Kennedy**. I can give you a ballpark figure. I would say 700, that our attorney has.

Mr. **Murphy**. Do you know how many administrative law judges they have serving this area? I forgot to ask that of the counselors who were up here before.

Mr. **Kennedy**. I don't know exactly how many we have.

Mr. Murphy. From your experience, are they imports? Are they brought in? Are they new? Do they change frequently? The ALJ's.

Mr. McCamey. I have no idea, sir. Mr. Sharp was supposed to have been here, and as John said——

Mr. Murphy. He handles all that?

Mr. McCamey. He handles all that. He submitted a written statement, and I think if you read that——

Mr. Murphy. We'll include that as part of the record.

[The prepared statement of Gerald F. Sharp follows:]

Prepared Statement of Gerald F. Sharp

Dear Chairman Murphy and fellow members. I would like to thank you for the opportunity to present the following written comments concerning Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 et. seq. I currently represent over 560 clients seeking benefits under the Act in my position as counsel for District 28, United Mine Workers of America.

Although I am sure some of the increase in my Federal Black Lung case load is due to the fact that more of our membership is aware that we provide the service I feel the vast majority of the increase is due to the fact that many claimants can no longer find attorneys in private practice who are willing to represent them in Federal Black Lung claims. The current crisis that claimants are facing in trying to obtain competent legal representation in these cases is directly related to the many problems concerning attorney compensation under the Act.

BASIC PROBLEMS

1. Attorneys Fees are contingent upon successful prosecution of the claim.
2. Long delays at the Department of Labor, Office of Administrative Law Judges and Benefits Review Board levels result in waiting years to be paid even in successful cases.
3. No interest payments are made on attorneys fees which may have been earned years earlier.
4. Private practitioners cannot afford to put large numbers of hours into cases in which they may well never receive any compensation.
5. The introduction of the permanent regulations contained at 20 CFR § 718 make the likelihood of successful prosecution of the claim very unlikely.

ATTORNEY FEES

The contingency nature of attorneys fees under the Act make it illegal for attorneys to charge for services rendered on behalf of a claimant if benefits are not awarded. This really was not too great of a problem until the permanent criteria contained at 20 CFR § 718 went into effect on April 1, 1980. Those regulations contain the definitions and presumptions concerning disability due to coal workers' pneumoconiosis, and they are very tough in comparison to the interim presumptions and criteria that applied to claims filed or reviewed under the 1977 Amendments to the Act. If a claimant's case is being processed under the interim criteria contained at 20 CFR 727.203(a) of the Secretary regulations he or she will have very little problem getting an attorney to represent them because large number of cases are approved under those regulations and attorneys have a reasonable chance of getting some pay for their efforts. However, so very few claims are being approved under the 20 CFR § 718 regulations that most attorneys in private practice just simply will not take the cases. I believe the Department of Labor's own statistics indicate that fewer than one out of ten cases are being approved under these new criteria. The problem is that attorneys cannot afford to put many hours into cases that they cannot possibly win.

Long delays are another major problem facing claimants which have a direct effect on their ability to get legal representation.

To illustrate the problem of long delays I have taken the liberty of reprinting a paragraph from the October 21, 1984, release from the General Accounting Office entitled, "Report to the Honorable Donald J. Pease":

"Given fiscal year 1984 staffing levels, GAO estimated that OALJ could take over 35 years to reduce its backlog of black lung cases to levels considered reasonable (6,000) and decisions on cases could take, on the average, more than 3 years through the mid-1990's. Recently, OALJ implemented plans to reduce this backlog more quickly by contracting with additional judges, and GAO estimated that this could reduce the backlog to reasonable levels in about 9 years."

The problem is obvious; if an attorney can take no fees even in successful cases until the time of a final adjudication, the attorney may not get paid until years after most of the services are rendered. In reviewing the cases that I had argued during the past year, I was not at all surprised to find that they had averaged five point nine eight (5.98) years from the date the claimant had filed his application to the date of his hearing before the Administrative Law Judge. The claimant will wait an average of six to nine months to get a decision once the Administrative Law Judge has heard the claim and in excess of another three years before the Benefits Review Board will decide the case should it be appealed.

During these extreme delays, the attorney may put in many hours of service, but will not receive any fees unless and until the case is finally approved. The actual statistics from the cases I handled last year indicate the attorney would have waited almost six years in successful non-appealed cases to get paid and almost ten years in his the successful cases that have been appealed to and finally approved by the Benefits Review Board. Although the attorney may have to wait almost a decade in the appealed cases to receive fees he or she will not receive any interest on the money earned. These long delays also cause considerable hardship and worry on claimants who go through years of litigation attempting to get their claims approved.

I believe the biggest problem that claimants are currently having in getting legal representation are directly related to the implementation of the permanent criteria for determining the existence of and disability related to coal workers pneumoconiosis found at 20 CFR § 718. As noted above, these criteria are applicable to cases filed on or after April 1, 1980. The new criteria makes it so difficult to win the cases that most attorneys are simply unwilling or unable to take the risk of putting many hours into claims that they will most likely lose and receive no compensation. Because the attorney only gets paid when he wins the case, the likelihood of successful prosecution of the case becomes a major concern. The new criteria makes that successful prosecution much more unlikely so many attorneys simply won't take cases under the new law.

CLAIMANTS PROBLEMS

Claimant face many other problems besides getting a competent attorney to handle their case. Major client problems include:

1. Changing definitions of disability make it more difficult to establish eligibility.
2. Extreme delays in the processing and adjudication of claims under the Act.
3. Extraordinary expense of a successful prosecution of claim.
4. Non-examining physicians being given great weight by the Administrative Law Judges.

Of course the major problem with the new criteria affect the claimants much more than they do the claimants attorney. They make it much more difficult for the miners to ever get the benefits so that many who are disabled by the ravages of the disease will never be compensated therefore. They are disabled to do their work and yet have no means of winning their claims because of the strict new criterias definitions of disability and the stiffening of the eligibility standards. Windows probably have the roughest time under the new standards and their problems have been increased by the 1981 amendments to the Act. If some changes are not made in the criteria themselves, I believe the current difficulties with the program will be with us for years to come.

The delays discussed above also put great burdens on clients who have to wait many years before knowing whether or not they will receive their benefits. In the usual case the miner has stopped working and has had a limited income on which to make ends meet while he or she is waiting to hear on their claim. If the claim is approved, the miner or widow may be paid from the Black Lung Disability Trust Fund, but under the new criteria almost no one is getting approved. The delays work to the advantage of the coal operators as they are given literally years to prepare their cases.

It has been my experience that these long delays enable the operators to hire expert witnesses from all over the country to review and comment on the miners state of health. Many of these reviewing physicians have never even seen the miners, but merely review medical reports of other providers. It is not at all unusual for the coal operators to get extraordinary large numbers of x-ray rereadings from friendly physicians indicating that the miners don't have pneumoconiosis. I have recently had two hearings where the operators had 57 and 62 negative rereadings of x-ray films. Some of those original films were read as positive for the disease by the treating physicians and radiologists. The more time the operator has the more evidence they can accumulate against the miners.

Successful prosecution of claims has become very expensive. Every time the operator sends in new evidence, the claimant must respond with additional evidence of his own if he's going to convince the judge that the operator's physicians are wrong. The claimant must go out and pay physicians to reread films on his behalf. It's not unusual for a claimant to have to pay for twenty or more rereadings in an attempt to convince the Administrative Law Judge that the operator's physicians are wrong. The claimant must also have several pulmonary work-ups which often run four to five hundred dollars a piece in order to keep pace with the opinions of non-examining physicians hired by the coal operators.

POSSIBLE SOLUTIONS

I offer the following only as food for thought and suggest that they might help eliminate some of the problems discussed above:

1. Elimination of the Responsible Operator provisions of the Act.
2. Allow attorneys to receive nominal fees even in unsuccessful prosecutions.
3. Provide reasonable staffing levels to help eliminate excessive delays.

I believe that the elimination of the responsible operator provisions of the Act may do more to reduce the problems in the system than any other single act. This "no fault" system would clearly help eliminate many of the major delays which have burdened the system in the past several years. I do not suggest that we eliminate coal industry responsibility, but that we merely increase the amount of moneys that the individual operators pay into the Black Lung Disability Trust Fund and then have the fund take over all responsibility for the payment of benefits. Such an approach should reduce significantly the amount of time between filing a claim and getting a final adjudication. It would also significantly reduce cost thru less administrative time being spent on each claim and would help eliminate the proliferation of medical evidence and cost related thereto.

By allowing attorneys to receive some minimal fees for work actually performed in the prosecution of claims, I believe many attorneys who have abandoned this type of work would again lend their expertise to claimants in need of representation. When the possibility of winning cases was much greater than it is today, claimants had little dificulty finding competent attorneys to represent them. Under the tougher standards in effect today, many claimants cannot find representatives willing to take the risk of many hours work for no pay. I have had many former black lung attorneys tell me that if they could charge even minimal fees for work actually performed, they would again start representing claimants but that under the current law they simply cannot afford to.

The Department of Labor is grossly understaffed at the regional offices, Office of Administrative Law Judges and Benefits Review Board levels. Recent legislation has increased the number of members on the Benefits Review Board but that has absolutely no effect on the many thousands of claims that are still before the Deputy Commissioners and that are in the Administrative Law Judges office. The GAO report cited earlier indicates that at current staffing levels it will be a decade before this backlog is reduced to reasonable levels. Clients don't understand that their claims are going to average five or more years to get to trial and frankly its hard to come up with any reasonably justifiable reason why they should have to.

CONCLUSION

I appreciate the opportunity to have these written comments considered by the committee and wish you all luck in trying to resolve some of the important issues facing the administrators, claimants, and those of us who deal daily with them.

Mr. **MURPHY**. Does he have an assistant helping him? Or does he try to do all this by himself? All these claims.

Mr. **KENNEDY**. He has assistants there at the office to help him get his case ready for——

Mr. **MURPHY**. But he has to handle the——

Mr. **KENNEDY**. He has to handle it himself. We only have one attorney.

Mr. **MURPHY**. Mr. Boucher.

Mr. **BOUCHER**. Thank you, Mr. Chairman.

Before asking a question of the witnesses, I'd like to ask for unanimous consent that all of the statements of the witnesses who have appeared before us today as well as the written statements which they brought from others be made a part of this record.

Mr. MURPHY. Without objection, they shall be included.

Mr. BOUCHER. Gentlemen, I appreciate very much your taking the time to be with us today. I note from my close work with all three of you that you are quite busy and that it is a sacrifice to come and spend this amount of time, but it is very helpful to the work of this subcommittee.

In reading Jerry Sharp's very thoughtful memorandum dated June 3 which he did submit to the committee, he noted that he's had a very substantial increase in his caseload in the last several years. The exact caseload that he cites is 560 cases at the present time. That's an enourmous caseload for any single person to be handling. I fully understand the reason that you're doing that, because you wouldn't turn away anyone who came to you and asked for help, and that's very commendable.

It's a serious problem, and we as Members of Congress have an obligation to address that problem in a responsible way. It seems to me, based upon the testimony we've heard, that what has contributed to this enormous increase in Jerry's caseload, and I'm sure the caseload of other United Mine Workers' attorneys throughout the areas where you have representation, is the time that it takes to process black lung claims, combined with the lengthy period for reviewing the fee petitions that private lawyers submit, combined with the change in the eligibility criteria for black lung back in 1980 which makes it more difficult now to be covered.

Those three factors combined discourage many private attorneys from representing black lung claimants, and that in turn is sending more black lung claimants into your office for help. I think we have an obligation to address those three problems, and I for one hope that we can move forward and to do so in an expeditious way.

Mr. Chairman, I won't detain the subcommittee further with questions of this panel. I think their statements are excellent and comprehensive, and I would just like once again to thank them for being with us.

Mr. MURPHY. Thank you, Mr. Boucher.

Mr. Perkins.

Mr. PERKINS. I don't have any questions or statements, I just want to thank you all, and everyone who's testified here today, for coming and I appreciate the things that they've had to say. It's something that I deal with on a daily basis two counties away, right across the hill over here, and I certainly understand what you all are talking about. Thank you for your testimony.

Mr. MURPHY. I would like to ask one further favor of both this panel and the prior panel. You have mentioned various cases by number or by alphabet. We intend to use these when we interview and cross-examine the DOL officials in Washington, and we'd just like to know from you if we are pinned down that these cases do actually exist, that you would then supply us with the name of the claimant.

Mr. WINSTON. We will do that sir.

Mr. MURPHY. We appreciate that very much.

I want to say that several years ago when Mr. Perkins' father, Carl Perkins, authored this legislation, the Congress of the United States and the people of the United States decided at that time there was a need, and we as present Members of the Congress intend to see that law is abided by. And we do not appreciate the bureaucratic and administrative interaction that has caused the serious delay of what is the law of the land. If they want to change the law then that should be the course of action and not administratively attempt to defeat the purpose of the law. I want you to know that we care very much about it and we do appreciate the testimony you've given us. You've given us the ammunition, so to speak, that we'll need for our next round.

Thank you very much.

[Whereupon, the hearing was adjourned.]

[The following letter was submitted for the record:]

June 21, 1985.

Hon. AUSTIN J. MURPHY,
Rayburn Building,
Washington, DC.
Re: Black Lung Benefits Backlog.

DEAR CONGRESSMAN AUSTIN: I am George Tate, Social Security #227038538. This letter is a follow up of a meeting held June 7, 1985 in Wise, Virginia.

I was employed by Clinchfield Coal Company for 48 years beginning December 27, 1932. The first two years I worked underground. The next 24 years, I worked on the tipple without protection from coal dust or any protective controls. Many times I have had to run out of the dust just to get my breath. The last 22 years, I worked at Clinchfield's Moss #3 Preparation Plant until my retirement September 25, 1980.

I would offer the following suggestions, to the Labor Board, which I believe would expedite the backlog of black lung cases:

1. A permanent black lung office be established in Abingdon, Virginia.
2. A local representative on the board who is familiar with the mines and miners. Verification of records could be hand-led with fairness and expediency.
3. The Department of Workmen's Compensation, Commonwealth of Virginia's determination be allowed to surfice as "proof of claim" thereby saving much time and expense for both the Government and the claimant.
4. A lung specialist or specialists to serve on the board, again saving both time and expense to claimants who are presently being asked to travel in excess of four hours for testing and evaluation.

In my own case, which has been pending for nine years, the findings of a noted lung specialist who has treated me for five years should be considered over reports from doctors who have never seen me.

5. Consideration for the number of years a claimant has been employed in productive mining.
6. Elimination of payment of black lung benefits to persons still employed.

I hope the suggestions will be considered in all or part so that some effort will be made to better serve the needs of claimants in a more efficient manner.

Sincerely,

GEORGE TATE.

INVESTIGATION OF THE BACKLOG IN BLACK LUNG CASES

THURSDAY, JULY 11, 1985

House of Representatives,
Subcommittee on Labor Standards of the
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 9:50 a.m., in room 2261, Rayburn House Office Building, Hon. Austin J. Murphy (chairman of the subcommittee) presiding.

Members present: Representatives Murphy and Petri.

Staff present: Richard Fiesta, counsel; James Riley, subcommittee legislative assistant; and Dorothy Strunk, Republican senior legislative associate.

Mr. **Murphy**. The subcommittee will come to order.

I apologize for being late. I apologize for my staff not realizing this morning is the whip leadership meeting at 9:15. We should have scheduled this for 10.

I will forgo the chairman's opening remarks.

[The opening statement of Hon. Austin Murphy follows:]

Opening Statement of Hon. Austin J. Murphy, Chairman, Subcommittee on Labor Standards

As Chairman of the Labor Standards Subcommittee, I have convened today's hearing as part of the Subcommittee's ongoing oversight investigation of the Black Lung Program at the U.S. Department of Labor. As all of us know by now, there is a massive backlog of cases at the 1st and 2nd levels of Administrative Appeal.

Last October the GAO reported the backlog to be at least 20,450 cases at the Administrative Law Judges office and approximately 5,234 cases at the Benefits Review Board. At that time the GAO estimated that with existing staff resources it would take over 35 years to reduce the backlog to levels that could be considered reasonble.

Since October the situation has gotten worse, not better. Despite the alarming GAO Report and continuing Congressional interest, the Department itself acknowledges in a letter from Undersecretary Ford dated April 26, 1985 that the backlog at the ALJs office has reached a new record of more than 21,000 cases. That same letter indicates that BRB now has a total of 5,687 cases which is also up from the figure cited in the October report.

That the Department would allow this situation to deteriorate further in the face of mounting criticism from the claimants and the Congress indicates insensitivity that is noteworthy even for this Administration. To date the resources alllocated to this important task do not indicate the level of commitment that will be necessary in order to achieve meaningful progress toward eliminating the backlog.

If the advance copy of the Department's written statement I have before me is intended as a reflection of the Department's new found determination to tackle this problem once and for all, it falls far short of the mark for both tone and substance.

We are concerned that the Department is still deliberating when action is long overdue. We have no doubts that the Department is focusing on this problem. The question is when do they intend to complete their review and implement the necessary steps to expand the resources of the ALJ's office. The Congress, and this Subcommittee, intends to see that justice and basic fairness are restored to the victims of black lung during this Congress. I asked the Department of Labor to come here today to tell us specifically what steps will be taken to alleviate this problem.

A basic commitment to address the problem might have sufficed at an earlier date. It is now time to get down to brass tacks. How many new Administrative Law Judges? Where? How many support staff and when? How much of a budget increase? What kinds of changes in personnel regulations are envisioned to allow the ALJs office to more efficiently use existing resources? These are the questions we want answered. Also, how soon we can expect these administrative, budget and personnel changes to be implemented and what are the projected target dates for reducing the backlog by a third, a half or complete elimination?

This is the second time in a few weeks that the Department has been summoned to appear before a Congressional Subcommittee. The statement delivered for the Secretary in Charleston, West Virginia, while encouraging straight-forward in its promise to resolve the problem, was certainly noteworthy for its brevity. The statement I have before me now from the Secretary's designated representative while some what longer does not yield a great deal of specific information about current and future plans for working through the backlog.

In conclusion I welcome the Department of Labor witnesses here today as well as the United Mine Workers Representative. I know we are all concerned about this problem. I certainly hope that we will learn more today about the Department's plans than I was able to glean from this statement.

I want to thank my colleagues here in the House for their continuing interest and support.

Mr. MURPHY. We will get to the first panel of witnesses. Thank you for being with us. Susan Meisinger is Deputy Under Secretary for Employment Standards. Mr. James DeMarce is Associate Director, Division of Coal Mine Workers Compensation. Lawrence Rogers is Director, Office of Workers' Compensation Programs. Thank you very much for being with us this morning. Ms. Meisinger, you may proceed.

STATEMENT OF SUSAN MEISINGER, DEPUTY UNDER SECRETARY FOR EMPLOYMENT STANDARDS, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY JAMES DE MARCE, ASSOCIATE DIRECTOR, DIVISION OF COAL MINE WORKERS COMPENSATION; AND LAWRENCE ROGERS, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Ms. MEISINGER. Thank you. I appreciate the opportunity to appear before the subcommittee today to discuss the Department of Labor's administration of the Black Lung Program.

The Department of Labor is in its fourth year of administering the Black Lung Program under the 1981 amendments, Public Law 97-119. The 1981 amendments to the Black Lung Benefits Act tightened the eligibility standards, prospectively eliminated certain burden-of-proof presumptions, and temporarily increased the excise tax on coal.

In addition to processing the 40,000 claims which have been filed since the 1981 amendments became effective, the Department continues to process three types of black lung claims: One, claims originally filed under the 1969 and 1972 versions of the Black Lung Benefits Act which are referred to as old part B and part C claims; second, claims filed on or after March 1, 1978, referred to as new part C claims, as a result of the 1977 amendments which modified the criteria in part C; and, third, medical benefits only, filed under the provisions of amendments to the act in 1977.

Claims for black lung benefits which are filed with the Department of Labor are initially processed by the Office of Workers' Compensation Programs, OWCP, within the Employment Standards Administration. Subsequently, parties who are adversely affected by an OWCP decision may seek reconsideration of the OWCP decision through filing additional evidence, or requesting an informal conference, or they may request a hearing before an administrative law judge within the Department's Office of Administrative Law Judges. They may also utilize all three mechanisms one after another. If a party wishes to appeal further, the case is reviewed by the Department of Labor's Benefits Review Board. A party dissatisfied with a Benefits Review Board decision may appeal to the U.S. Circuit Court of Appeals.

One of the Employment Standards Administration's primary objectives is the processing of claims in as timely a manner as possible while ensuring fair and objective decisions. For the black lung program the timeliness standard requires issuance of an initial finding on 90 percent of the claims received within 180 days. Each year, our system has moved closer to that goal. In 1984, only three district black lung offices failed to meet the 90-percent goal. So far this year, only two of the currently nine district black lung offices have failed to meet the goal. We anticipate that by the end of this year, ESA will achieve the programwide average of initially adjudicating 90 percent of the claims filed within 180 days.

The 1977 amendments to the Black Lung Benefits Act required the Labor Department to review previously denied and pending claims in the light of new eligibility requirements. Some 125,000 claims previously filed with the Department of Labor plus an additional 100,000 claims filed with the Social Security Administration fell into this category. To these totals were added over 100,000 claims for medical benefits only which were also authorized by the 1977 amendments. To this mass of claims were added approximately 2,000 new claims which were received each month during the late 1970's. That incoming claim volume is now down to less than 1,000 new and refiled claims per month. All told, ESA has been responsible for the adjudication of 470,000 claims since the enactment of the 1977 amendments. As of June 28, only 4,918 claims remained without an initial adjudication.

We are keenly aware of our obligation to the parties to refer unresolved cases to the Office of Administrative Law Judges as quickly as possible. On April 1, 1984, ESA implemented a new timeliness standard on OALJ referrals. Over 10,000 cases were referred to the Office of Administrative Law Judges during fiscal year 1984, twice as many as we had projected in our fiscal year 1984 estimates. As of May 31, we have referred 4,913 cases during fiscal year 1985 and anticipate approximately 7,000 referrals by the end of the fiscal year.

Only two district offices, Charleston and Pikeville, still have significant backlogs of cases in which hearings have been requested that are awaiting referral. However, as we concentrate on these two offices, they too will be current in Office of Administrative Law Judges referrals by the end of this fiscal year.

All told, ESA has referred over 51,000 disputed cases to the Office of Administrative Law Judges since the enactment of the

1977 amendments. While this effort has placed us on a current basis in most of our district offices, it has transferred the case backlog from ESA to the Office of Administrative Law Judges, where some 21,000 cases are now pending.

Chief Administrative Law Judge Nahum Litt met with Secretary Brock on June 21 regarding the backlog of black lung cases. The Secretary has asked me to convey to this subcommittee his personal commitment to resolving this unacceptable situation. He has directed his executive staff to develop a formal analysis of the situation and to present a plan which will address the actions necessary to resolve this problem by eliminating the present backlog as soon as possible.

As directed by the Secretary, the Labor Department's management has been studying various alternatives to resolve the problem. This study includes a review of actions that have already been taken to expedite appeals decisions. As the OALJ level, these actions include borrowing administrative law judges from other agencies, contracting with retired judges and others to serve as law clerks and to hear cases, and making maximum use of existing personnel to handle black lung cases.

Based upon our review of these efforts and the nature of the problems we face, Secretary Brock expects to make a decision in the near future on a specific plan to resolve the backlog problem.

The Benefits Review Board, the appellate tribunal that reviews cases in which a party is dissatisfied with a decision from the Office of Administrative Law Judges, was created in 1972 under the Longshore and Harbor Workers' Compensation Act to replace the U.S. Federal district court's jurisdiction over black lung and longshore cases.

As I stated earlier, the 1977 amendments to the Black Lung Benefits Act mandated the review by the Department of Labor of over 300,000 black lung claims. The Benefits Review Board, however, was not expanded at that time but remained a three-member tribunal. In 1978, 797 new appeals were filed with the Board. The Board issued 955 dispositions and at the close of the fiscal year 1978 had a pending caseload of 484, of which 222 were black lung cases. The claims to be considered pursuant to the 1977 act began to reach the board in 1980.

In fiscal year 1981, 2,620 new appeals were filed with the board. The board issued 1,105 dispositions, and at the close of the fiscal year, had a pending caseload of 2,763, of which 2,228 were black lung cases. During fiscal year 1982 through fiscal year 1984, the number of appeals filed continued to rise and the pending caseload steadily increased.

On September 28, 1984, as part of a number of amendments to the Longshore and Harbor Workers' Compensation Act, the Board was expanded to nine members, five permanent and four temporary. Action was subsequently taken to provide the support personnel necessary to increase the Board's dispositions and, as of May 6, 1985, the full complement of nine members was in place.

Currently there are 7,340 appeals pending before the board; 5,774 of those appeals are black lung cases. A nine-member board with full support staff will dispose of 3,360 black lung cases per year, therefore, requiring about 21 months to process the appeals now pending. If new black lung appeals continue to be received at the rate of 2,400 cases per year, the backlog of pending black lung cases would be reduced at the rate of 960 cases per year, requiring approximately 4.3 years to eliminate the backlog of black lung cases. The average individual case, of course, would be completed in less than half that time with the time required steadily decreasing over the 4.3 years. We are reviewing ways and means to handle an expanded volume of appeals as OALJ output increases.

Finally, I would like to address the issue of attorney's fees. If a miner obtains legal counsel to help to obtain benefits and is successful, the attorney's fees are usually paid by the party found responsible for the payment of those benefits, the responsible mine operator or the black lung disability trust fund. These awards are based on the reasonable value of the necessary work performed on behalf of the claimants by the attorney. The Department has been criticized for delays in the payment of attorney's fees. In calendar year 1982, the Department paid nearly $3 million in attorney's fees from the trust fund. In calendar year 1983, the amount exceeded $6 million. In 1984, the figure again approached $3 million. Additional amounts were paid directly by responsible mine operators and claimants. As we have become current by resolving the backlog of pending claims, we have also become more timely in paying legal fees.

Mr. Chairman, in concluding my statement, I want to reiterate Secretary Brock's commitment to promptly resolve the backlog problem in black lung. My colleagues and I will be happy to answer any questions that you or the other members of the subcommittee may have.

Mr. Murphy. Thank you very much, Ms. Meisinger.

We have been joined by Congressman Petri, the ranking member on the subcommittee, to my right, and have Congressman Bob Wise of West Virginia with us, who has been conducting separate hearings in another committee.

You have thrown a lot of figures at us. To clarify, what are your latest figures on the backlog in the Department of Labor office, as contrasted then from the administrative law judges and the Benefits Review Board?

Ms. Meisinger. Currently, within the black lung claims processing offices, in terms of claims adjudication, we are virtually on target. We are processing 90 percent of all claims within 180 days. We are virtually current in the claims processing or the intake stage of the claims development and adjudication.

Mr. Murphy. So, you believe you are 80 or 90 percent current in your handling—of course, that's the initial processing stage.

Ms. Meisinger. The initial determination and findings.

Mr. Murphy. At the initial determination and findings.

Ms. Meisinger. Yes, sir.

Mr. Murphy. What is the percentage of claims approved at that initial stage, do you know?

Ms. Meisinger. Currently, the approval rate is about 5 percent.

Mr. Murphy. And 95 percent then denial?

Ms. Meisinger. Yes.

Mr. Murphy. At the initial stage.

Ms. Meisinger. At the initial stage, yes.

Mr. MURPHY. And of the 95 percent denied, how many of those are then appealed to the ALJ's?

Mr. DEMARCE. Many of the denied claims will go through an administrative reconsideration or informal conference. But our expectation is that approximately a third of the claims, which are denied administratively, will result in request for a hearing before an administrative law judge.

Mr. MURPHY. Only a third?

Mr. DEMARCE. Yes.

Mr. MURPHY. Of those third, do you have any statistics on how many are eventually approved at the ALJ level?

Mr. DEMARCE. There have been relatively few administrative law judge decisions on cases governed by the 1981 amendments. On administrative law judge decisions on previous versions of the act, with more liberal eligibility criteria, the experience has been approximately 25 to 30 percent of the denials would become awards.

Mr. MURPHY. How about the Benefits Review Board, what is the ratio of reversals there then?

Mr. DEMARCE. I don't have a precise figure. My understanding is that it is significantly lower. However, the Benefits Review Board does remand many cases to the ALJ's for further consideration, so they may ultimately result in awards.

Mr. MURPHY. It seems to me then that the initial 5 percent of the cases that you are approving represents both 1981 and prior to 1981. Don't you have some system in your field adjudication of these decisions to differentiate the manner of proof between the two types of claims?

Ms. MEISINGER. Yes, the different types of claims fall under different provisions of the statute. Because of the timing of claims filing, they are all governed by different criteria, and that's how they are processed. But claims coming in subsequent to 1981 are governed by the 1981 amendments to the law.

Mr. MURPHY. Right, but it seems to me that by approving only 5 percent of the claims in the initial stage, you are inviting the backlog at the ALJ and the Benefits Review Board section. You must not be granting any of them under the 1981?

Ms. MEISINGER. Well, the 5 percent comes down to less than 1,000 per year. The incoming claims have declined over time as well. The approval rate has declined, as you mentioned, as a result of 1981 amendments. But the claims load in the overall numbers is dropping. So, we don't view that approval or disapproval rate as having a major impact ultimately on the current problem that exists with the administrative law judge backlog. That is, in large part, a result of the 1977 amendments. If you can picture a snake swallowing a mouse, the mouse is working its way through the system.

Mr. MURPHY. Mr. Petri, do you have any questions?

Mr. PETRI. We have got a lot of mice out there who are unhappy working their way through the system.

Ms. MEISINGER. Yes, a lot of indigestion.

Mr. PETRI. It's taking so long. As you know, this committee has had field hearings through coal country, in Pennsylvania, West Virginia, and other places. There are an awful lot of people who are quite frustrated and unhappy because they perceive a marked slowdown in the way these things are handled, whether that's borne out in your figures or not.

How many initial claims are you getting a year now?

Mr. **DeMarce**. Our experience has been that we had been receiving somewhat over 1,000 claims a month at the time of the 1981 amendments. That has declined somewhat. So it is now somewhat less than 1,000 per month.

Mr. **Petri**. So, you get about 11,000 a year, say, roughly?

Mr. **DeMarce**. Roughly.

Mr. **Petri**. And you're approving about 500 a year, and sending about 10,500 on, or whatever percentage of those end up appealing to an administrative law judge hearing?

Mr. **DeMarce**. Our expectation is that next year we will be referring about 5,000 cases to the administrative law judges. Some of those are cases which go back to prior versions of the act. The majority of them, however, will be cases which have been processed under the 1981 amendments and denied under the 1981 amendments.

Mr. **Petri**. You may not have these figures. Do you have any figure as to the average age of people who are applying for black lung now, and what percentage die before their claims are finally processed?

Mr. **DeMarce**. Our typical experience has been that people apply for benefits when one of several things happens: either they become seriously ill, and are no longer able to work, or they may experience a prolonged layoff in the industry and tend to file for benefits at that time; or perhaps most commonly of all, when they retire they will file a claim for benefits. That tends to mean that the typical incoming claim is from someone whose age is somewhere between the midfifties and the midsixties.

Mr. **Petri**. I guess you may have given us this. I guess there are some claims that have never been resolved, aren't there? So, you couldn't say what's the longest time a claim has ever taken before a final denial, I suppose?

Mr. **DeMarce**. Well, that is a very difficult question to answer, because that is not within our power. The parties can keep the claim alive indefinitely because any party can reopen a claim anytime up to 1 year after the last denial or the last payment. So, the claim may stay in process indefinitely. As you know, I think, in the 1972 and 1977 amendments, previously denied claims were revived; and we were required to reconsider them.

So, there are claims that have been in the system quite literally since the beginning of this legislation, but have been repeatedly decided but are still not finally decided, because some party is dissatisfied with the most recent decision.

Mr. **Petri**. I am trying to recall the gist of the testimony at some of the previous hearings, but there seemed to be a feeling that there are not enough administrative law judges and there could be more assigned to this work to speed up that level of determination, perhaps by taking some from other jobs who are not as fully occupied. Let me ask you this. Do you think this is such a peculiar and specialized area of the law that someone who is a skilled trier of other kinds of cases could not be quickly up to speed in processing these types of cases?

Ms. **Meisinger**. I suspect that Judge Litt, who will follow me, has some views on that of his own. I don't think that they are of such peculiarity that other administrative law judges or hearing officers would not be able to hear and decide these cases. Some of the things that we have been looking at, and the Secretary may ultimately be looking at as well, is the borrowing of administrative law judges from other agencies where their workload, for whatever reasons, may be on an ebb. They might have resources in other agencies, and trying to determine what kind of flexibility we have as a matter of law in doing that kind of sharing. Also, we are examining contracting with attorneys and retired judges, within the limitation of the procurement laws and the retired annuitant's entitlement to getting outside income, experimenting, looking at the mix of what is out there, whether or not it is a question of support, adequate support, adequate numbers of judges, or what the mix might be.

All those elements are things that are being looked at within the Department. Quite frankly, we had hoped to have something by today. We regret that we don't have something today in terms of a game plan to present.

Mr. **Petri**. Right now, is it that you are still sort of gathering your——

Ms. **Meisinger**. Gathering the information.

Mr. **Petri**. And then you have to submit it to the Secretary, and then he will be forwarding it—he will either be acting on it and reporting or——

Ms. **Meisinger**. Or telling us we're crazy and asking us to go back and rework it.

Mr. **Petri**. How long do you think this——

Ms. **Meisinger**. The Secretary is committed to moving promptly. We are working as quickly as we can. This is a priority for the Secretary. I can't stress that enough. He is not happy with this backlog.

Mr. **Petri**. A cynic would say that in this area the Department's definition of promptly is different from that of most real-world people because the cases aren't being handled that promptly.

I know you can't commit the Secretary, but do you have some idea of a timeframe?

Ms. **Meisinger**. Well, the Secretary asked almost 3 weeks ago for something within 3 weeks. So, that should give you some indication of the kind of time push that we are under.

Mr. **Petri**. So, you are hoping by early fall to——

Ms. **Meisinger**. Within a week to get something——

Mr. **Petri** [continuing]. Actually have something done, more people assigned to handle these?

Ms. **Meisinger**. Yes, I would hope so.

I think that the Secretary wants something, he wants the problem addressed.

Mr. **Petri**. Thank you.

Mr. **Murphy**. How many pre-1981 cases do you know are still pending?

Ms. **Meisinger**. The bulk——

Mr. MURPHY. Still in the initial stage, still without a determination from the Department of Labor in the initial stage? Are there any?

Ms. MEISINGER. There are none that have not had a first finding.

Mr. MURPHY. All of the pre-1981's have had a first finding?

Ms. MEISINGER. Yes.

Mr. MURPHY. You are then substantially—when you're talking about your 5-percent figure today to me, you are telling me that it is based on the 1981 law?

Ms. MEISINGER. Yes.

Mr. MURPHY. Doesn't it concern you that half of the appeals that go before the ALJ's are reversed on you? And what kind of word do you have out to your people in the field, those who are making these initial determinations, when at least half of your appeals are being reversed? The backlog is being created if you're denying benefits to a person at the ALJ level and finally the Benefits Review Board determined you bounced a ball into somebody else's court that shouldn't have been bounced.

Mr. DEMARCE. I think, Mr. Chairman, you have to look at what group of cases it is which are currently being decided by the administrative law judges. Those are overwhelmingly cases where the claimants' rights are defined by the 1977 amendments. And those are cases which, because of the delays which we are concerned about, where in many instances the administrative law judge is giving his decision on a body of evidence which has developed over the course of the past 2 or 3 years after it was decided administratively. It is extremely important, I think, to understand that the criteria under the 1977 law which serve to create presumed eligibility do not have tables which correct for aging factors. A person's health may deteriorate because of reasons of advancing disease or just simply deterioration with age, which would mean that the person who was not eligible in 1982 may well now be eligible because the facts of the case have changed in the interval.

Our experience, however, has been not a 50 percent reversal but, with regard to claims denied administratively where the trust fund is potentially liable, that the reversal rate has been more in the neighborhood of 25 to 30 percent, many of those because of new evidence which did not exist when we last determined the case.

Mr. MURPHY. Mr. Wise.

Mr. WISE. Thank you, Mr. Chairman. I appreciate the opportunity to join this panel. I also appreicate your great help in working with the Government Operations Subcommittee on Employment and Housing which has conducted hearings on the same issue.

Ms. Meisinger, I would like to follow up on Mr. Petri's remarks. I believe it was on June 21 that Secretary Brock met with the two Senators from West Virginia and the Senator from Virginia, Mr. Warner. Our impression was that there would be a plan or at least a proposal within 3 weeks. We just urge all due speed on that.

We handle one of the largest caseloads in the Congress, incidentially, on black lung. I have said often that, when a miner walks in our office, we have to tell them if they are going to the ALJ level or to the Benefits Review Board, it's going to be 4 to 7 years. And that's just too long.

So, can you give us any kind of ballpark figure when this proposal might be forthcoming?

Ms. Meisinger. I would hope within the next 4 to 6 weeks, on the outside.

Mr. Wise. Would that be the point it goes to the Secretary or the point at which the Department has made a decision?

Ms. Meisinger. I would hope that that would be the point that you would be receiving something.

Mr. Wise. There's another concern also. A number of us have submitted legislation, each dealing with our interpretation of the problem. Mine would add 10 ALJ's. Others would set time periods in which responses have to be met, things like that. I would think that a lot of the need for this legislation could be taken care of by the prompt response of the Department of Labor in putting forth a proposal that everyone recognizes would work.

You said that there were only two district offices in which you were not meeting that quota. One is Charleston, one is Pikeville. I represent Charleston. What are the reasons for that? And what steps is the Department taking to resolve that?

Ms. Meisinger. As you are aware, we have had some difficulties with the Charleston office with a number of individuals being indicted and subsequently convicted for defrauding the system. That created some furor within the office. We have allotted more staff positions to that office as well as brought in new management and substantially shifted stuff in that office. But, as you can imagine, when you start digging out, taking care of a backlog, it takes time.

We are committed to having that office current by the end of this fiscal year, September 30, 1985.

I don't know if Mr. Rogers has anything he would like to add on that.

Mr. Rogers. I think when that problem occurred, we went in there with staff to help. But since then, we have also moved some of the workload from that office to other offices to help get it current. The management in that region has given us a plan to work down their backlog by September 30. We are getting biweekly reports from them and tracking them to be sure that by the end of this fiscal year that Charleston in your district and Pikeville down in Kentucky both are current with their workload.

Mr. Wise. And that will be by September 30, 1985?

Mr. Rogers. Yes, sir, this fiscal year.

Ms. Meisinger. Yes, this fiscal year.

Mr. Wise. I believe you made some reference in the statement, but have you considered the possibility of having ALJ's, at the GS level of 16 hearing the cases that right now only 15's are hearing? The proposal has been made that 16's would hear those cases. Is that on the boards?

Ms. Meisinger. As you know, there has been an ongoing discussion between OPM and the Department regarding the proper classification and workload distribution within the office of administrative law judges, wherein black lung work is classified as GS-15 work. Those discussions are, hopefully, going to be coming to closure soon as well. We have not quite yet finally resolved that issue.

Mr. Wise. As you do that and as you perhaps look at temporary ALJ's, I am reminded of testimony this committee heard in Uniontown, Mr. Chairman, in which some miners are projecting that indeed, instead of black lung cases decreasing, as the older miners work through the system, that indeed with the advent of new technology, particularly mining which increases the dust in many instances, that actually we are going to see the number of cases increase and a younger miner coming in to file for black lung.

Have you made any projections on what the black lung caseload will be in years to come and particularly taking that into consideration?

Ms. **Meisinger**. Not to date, no.

Mr. **DeMarce**. We have made projections which assume for the near future essentially a steady state of approximately 10,000 additional claims coming in each year. We understand your concern about the new technology, but I think it's too early to assess how that may affect claims 20 or 30 years down the road.

Mr. **Wise**. One final question deals with the backlog, although not quite the one dealing with benefits. I had a call yesterday from one of the rural health clinics in West Virginia that provides the respiratory therapy needed to miners. Because of the delay in providers, who are treating these people—being reimbursed by the Department of Labor—this particular clinic has claims going back to 1983. They will close that program out, as they are forced to out of financial necessity, in mid-August. The result will be 300 to 400 miners that will not be getting that treatment.

We contacted another clinic today that tells me they are also experiencing similar problems, although not quite as severe. I think they are able to adjust their cash-flow in a little different way. I would like to give you the name of this clinic at the conclusion of your testimony and urge you to work with them so that we don't see clinics providing the vital respiratory care needed having to close because of failure to reimburse.

Ms. **Meisinger**. I would like Mr. Rogers to address this because this is an area where we have had some concern as well. We have been working very hard fixing the problem.

Mr. **Rogers**. We would be glad to have the name of that clinic. We wouldn't want someone closed because we weren't paying bills appropriately. We will take immediate action if that's the case.

However, we have had some problems in this area of the use of oxygen for people who are nominally suffering from pneumoconiosis. Upon retesting, we have found a number of the people should not have had the oxygen. It has created a situation in which there may have actually been some malfeasance by some providers in manufacturing evidence for the use of this equipment. As a result, we are looking at this very carefully. It is a complex problem.

But if it is a crisis situation because legitimate bills have not been paid, we will act on that promptly and make certain that they are paid.

Mr. **Wise**. I know that there are a lot of miners that would really appreciate that.

Thank you.

Mr. **Murphy**. Thank you, Mr. Wise.

Mr. Wise opened up the disparity in the assignment of caseloads between 15's and 16's. Why is it that the Department of Labor is the only Department that runs this classification between the two

ALJ's? And at the same time you are addressing that answer, what is the prospect of either eliminating the description and allowing them all to be assigned the work instead of just—you know, you've got the 16's handling longshoremen, which doesn't seem to me any different grade than black lung cases, and yet you refer to black lung case as low grade and only assign them to 15's? The 16's will often sit, as I understand, without a sufficient caseload.

Do you suppose that this is in the recommendations that may be coming from the Secretary?

Ms. MEISINGER. I am not going to try and fool anybody with saying that I know what all the nuances are in the personnel system with the job assignments and the GS level, GM levels, what work is assigned to which person. I can say that, yes, that is one piece of all the issues that we are dealing with in presenting something to the Secretary. That is one element in what we are looking at.

In terms of why it is the way it is, I can't answer, because I am not an OPM classification specialist.

Mr. MURPHY. Are you going to make recommendations to the Secretary for his consideration in his decision as to how to eliminate the backlog? You know, 4½ years is still too long a time for many of these cases to be dragging. Are you going to be making recommendations to him, you three, or is he looking to you for consultation?

Ms. MEISINGER. Yes; he has appointed a task force within the Department to put together a plan which will be presented to him.

Mr. MURPHY. Are any of you serving on that task force?

Ms. MEISINGER. I am, yes.

Mr. MURPHY. We had some very interesting and informative testimony from country lawyers that have been handling these cases in the States of Virginia, Pennsylvania, and West Virginia. They had some very good points. We are going to send those to you as succinctly as we can possibly put them.

Ms. MEISINGER. I would appreciate that.

Mr. MURPHY. I might also ask if you would consider, or the Secretary would consider the possibility of the assignment of temporary ALJ's. I know at times we will hear the objection from the Department, well, no lawyers want to take a temporary job, and so forth. I really think that they would. There are a lot of qualified lawyers who reside in these areas, many of whom are familiar with compensation, either through the State system of compensation or the Federal system of compensation. And a few months' work could go a great way in eliminating the backlog for the ALJ's. They could work under the district judge who is presiding in that district. I think it would be something that would be economically feasible for the Federal Government to do.

Ms. MEISINGER. I will make it a point to include that in the issues that we are looking at.

Mr. MURPHY. Well, OK. I want to thank you very, very much for giving us your time this morning.

Ms. MEISINGER. Thank you.

Mr. MURPHY. The next panel is the Honorable Nahum Litt, chief administrative law judge, and the Honorable Robert Ramsey, chief administrative law judge, Benefits Review Board. Gentlemen, I want to thank both of you for also interrupting your very busy day and coming here. We will try to expedite your testimony as quickly as possible so you can get back and get rid of this backlog.

Judge Litt, perhaps you are prepared to proceed.

STATEMENTS OF THE HONORABLE NAHUM LITT, CHIEF, ADMINISTRATIVE LAW JUDGES; AND THE HONORABLE ROBERT L. RAMSEY, CHIEF ADMINISTRATIVE APPEALS JUDGE, BENEFITS REVIEW BOARD

Judge LITT. Thank you for inviting me.

I would like to just clarify some of the issues that were raised previously just so the record will be, I think, a little clearer. The current grade 15 and grade 16 split has its origins back in 1972 and has been a pending problem with DOL ever since. It is not the dog, it's the tail of the dog. In fact, the need for resolving it is the ability to more expeditiously be able to recruit, to retain, and to place judges who will not be seeking to leave us to go to other positions. It is relatively complex. It does have its origins in some of the personnel requirements as interpreted by OPM. We are seeking to resolve it.

Mr. MURPHY. Can I interrupt you for one moment?

Judge LITT. Yes, sir.

Mr. MURPHY. You said to recruit them so you don't lose them. What is the salary of a 15 compared to a 16? And are you suggesting they should all be 16's?

Judge LITT. I am suggesting that they should all be 16's. The salary is almost irrelevant. It is a question of the type of cases that they hear and the question of interchangeability with other agencies at the grade schedule.

Mr. MURPHY. At the 16 level.

Judge LITT. Primarily. It's not—for example, at the Department of Labor the amount of money for the difference is almost de minimis.

Mr. MURPHY. What is the difference?

Judge LITT. I think almost all of the GS-15's that we have are earning about what the GS-16's earn. It's really a personnel—I don't know how to describe it. It's a personnel problem and not really a salary problem. Most of the judges that we would recruit, for example, would be other judges already on the system, that we could bring on quickly. And most of those that we would seek to recruit would be 15's at some other agency such as Social Security, which is the only agency currently having any grade 15's other than ours.

I might like to talk to that, if I may, too. We cannot just hire an administrative law judge. They come off of a register which is a very rigorous exam where one applies; it's unassembled, and it takes 6 months to a year to be qualified. They are very strict employment terms. One must take from those registers only from among the top three. It does have some veterans' preferences that are included. We are very restricted as to whom we can hire and whom we can put on board. Under the Administrative Procedures Act at this point there is actually not a register. It is being created by the Office of Personnel Management under a changed system.

We expect that there will be a register sometime in either late summer or early fall.

Mr. Murphy. By not having a register, do you mean you do not have a list of qualified persons?

Judge Litt. And I could not select at this point from the outside any person until such time as they create a list and inform me who is eligible on that list and at what level they are eligible. So, that's one problem we have in recruitment, but that we expect to be over shortly.

The other problem is that, when we go to other agencies, and in this case it would be principally Social Security, and seek to have a judge move, there is no incentive to move from a grade 15 to another grade 15 position, which might be a dislocation of their families and a movement to another office. Worse than that, we have a 4-year center here. Every proposal that has been put forward that I am knowledgeable of would have the backlog reduced, certainly by the end of about 2½ years to 3 years. You would be attempting to employ judges and have them at certain locations and then have them not have adequate work at the end of that time in this particular program.

I might add, we are overloaded in every case area. We have backlogs in almost every area in which we have cases at this point. We have been putting a significant amount of resources into black lung, which has in fact caused greater time delays in other cases. Our office handles roughly 73 statutes, of which black lung is one and, I might add, a very important one. At this point the most important one. But we do not have judges who are idle anywhere. There are currently over 4,000 longshore cases, for example, pending.

I think the only other thing I would like to touch on was the temporary administrative law judges. There is no way in which we could pick them up. It is not a question just of expertise. It is the question of the Administrative Procedures Act and the protections that are guaranteed for the independence of the decisionmakers in adjudicatory functions within the executive department.

We do have a way of picking up retired judges and borrowed judges. We have been very vigorously pursuing those options, even while we are awaiting the Secretary's decision of what would be the best mix. The Department has always taken the problem very seriously. As the backlog started to increase through the tremendous filings and refilings which I think were just described to you, where every case filed prior to 1977 had an opportunity for the claim to be refiled and had to be re-reviewed in a very short period of time. So, it's not a matter which has been put aside. It's a matter which has been continually addressed. But, of course, it has difficulties in how you address a very large volume of cases coming in, in a very short period of time, which you do not expect to continue into the future at those levels.

Mr. Murphy. Before we get into further questions, we will ask Mr. Ramsey to go ahead with his initial comments, and then we will question you both.

Judge Ramsey. Congressman.

The Benefits Review Board is the final step in the administrative processing of cases under a variety of acts, predominately the Longshore and Harbor Workers' Compensation Act, the Benefits Review Board is nonreviewable by anybody except the court of appeals for the appropriate circuit or the U.S. Supreme Court. The decisions which we render are on the record made before the administrative law judges. We do not hear any new evidence. We do not take new evidence. If the parties attempt to submit new evidence to us, the cases are remanded to the Office of Administrative Law Judges or, in appropriate cases, to the deputy commissioners for the various districts for consideration of that evidence.

As Ms. Meisinger indicated, there has been as a result of the 1977 amendments, sort of a bubble of cases which has been moving through the system. It has reached the Benefits Review Board. It reached there in about 1981. Since then, we have had a steady increase in the number of appeals which are filed with the Board.

The Congress recognized the problem and in 1984 increased the membership of the Board from three to five permanent members and further authorized the administrative law judges to supply upon the request of the Secretary four additional administrative law judges. We have borrowed four administrative law judges from Judge Litt's staff, thus exacerbating Judge Litt's problem to a certain extent, because being basically selfish by nature in terms of my work, I picked the people that I thought could best do the job. I am sure that that has had a very negative impact on Judge Litt's work and has complicated his problem.

We have seen the beginnings of the increase in productivity by the board as a result of the increase in the size of the board. In 1984 we doubled the production over 1983. This year we are running ahead of 1984 and will exceed, we expect, the figures that we produced in 1984. We expect next year to increase once again in the number of cases which we are producing. So, we have been the recipients of a large number of cases. We have been in a better position really to address them than has the administrative law judges simply because the numbers that get to us are lower than the numbers that get to Judge Litt.

We still have a problem. There is no question about that. As the staff is brought on board, and we expect all of our support staff to be on board not later than the close of the fiscal year, we have had a problem in staffing up due to the unavailability of space. Our present quarters were not large enough. Once again, we raided Judge Litt—if you wish to use that word—and commandeered some of his space. We are now waiting for GSA to approve the contract and to perform the construction. We expect that to begin in the very near future.

I think basically that is the extent of any statement that I would make. I would be more than happy to answer any questions you gentlemen may have.

Mr. Murphy. Thank you very much.

Judge Litt, Ms. Meisinger stated that Secretary Brock and you consulted in the month of June, June 21, I believe. Without disclosing anything that may have been of a confidential nature, did you make some proposals to the Secretary, or was that the nature of the meeting? What input are we getting to Secretary Brock on the problem? It seems as though a great measure of our problem rests with the ALJ stage of the consideration of the claims. Did you make any recommendations to the Secretary?

Judge LITT. Yes; we first informed the Secretary and brought him the information that he needed to be able to apprise what he might need from others in order to make decisions.

And the second thing that I did was to discuss with him a number of various options that he might have on what we were currently doing and how we might resolve this problem and what the time frames would be. They are all of the ones which have been described, which is the borrowed judges program, hiring against our current ceilings, without lapse times, to avoid the delays of having judges and other personnel not on board and having a significant delay in——

Mr. MURPHY. Will you clarify that? Is any further action of Congress needed. Your saying hiring against your present ceiling, which would indicate to me that the ceiling level established is unsufficient. What do you mean by that?

Judge LITT. Well, I really am not in a position, Mr. Chairman, to discuss, I think, options that are before Secretary Brock at this point which would exceed what our current budget and our current arrangement on personnel are. Those are decisions that he would certainly have to make as to whether or not there would be any reason to do that, given the mix of options we have given him which might be able to bring a——

Mr. MURPHY. Do you have your full complement now under budget authorization? Do you have your full complement of ALJ's?

Judge LITT. Yes; we are at full complement at this point except for a couple of recent retirements and the four judges that went over last month on a pretty near permanent but nonetheless temporary basis. We will fill those positions as soon as we can.

Judge RAMSEY. I hope they're not permanent.

Mr. MURPHY. Are you authorized then to fill those four positions again?

Judge LITT. Yes, sir, sort of at a transfer out so that you—

Mr. MURPHY. You supplement your——

Judge LITT. Yes, we are actively seeking to recruit. We are holding off, however, until we have a better understanding as to what mix of options the secretary will take. For example, we have decentralized. Judge Ramsey indicated that he had commandeered our space, but in fact we have deliberately been moving judge positions from the Washington area and bolstering the offices both in Pittsburgh and Cincinnati, which is where we are principally serving the Black Lung Program, and Boston and Hampton, where we are serving a very large longshore case area.

We have reduced our Washington staff from 64 judges in the beginning of 1980 to, I think, 37 judges as of now. So, we have been taking many, many steps to cut down unnecessary travel, to avoid the lost time of travel, to make better use of what we think are field offices where our staffing patterns can be more productive.

Mr. MURPHY. Did you suggest to the Secretary perhaps that all of the judges be at a 16 level or equivalent thereto that you no longer have this artifical barrier?

Judge LITT. That has been a departmental policy at least since 1972. It was reiterated in 1980 and has been followed through by the Department consistently. I discussed with him the fact that a single grade would permit us much better management, much better recuiting and retention of judges and that it would permit us in the current circumstances, because of limitations on what some judges can do and the percentages of their work, a much quicker start at the first part of fiscal year 1986 in getting enough cases heard so that we could attack the problem in a better manner.

That is in fact one of the keys as far as my office has been concerned with a fast start. It doesn't mean that, absent it, we would not be able to address the problem, and I believe he understands that. In my opinion it would take a little longer to do and it would be a little bit more difficult, and we would run into problems.

We have had a significant turnover, for example, of judges in the Pittsburgh area occasioned by judges taking the lower grade position and then shifting to another agency at the higher grade as soon as they could find another position available. We have recruited a very high standard of our judges in terms of their abilities. They are not having that difficult a time in finding other positions when they become open. So, it's a retention problem, among others.

The letter that was——

Mr. Murphy. Will that retention problem be eliminated with the change in classification?

Judge Litt. Yes, sir.

Mr. Murphy. Because there would be no reason for them to go out and search higher grade work somewhere else.

Judge Litt. That's correct. We would be able to give them some of the work which we have not been able to give them which many of the judges find more interesting in addition to doing the black lung work, which is very important but is a volume work and sometimes is not considered as interesting as a variety that might be made available.

Mr. Murphy. How many ALJ's do you have at the 15 and 16 levels?

Judge Litt. There are currently, I believe, 60 grade 16's and 23 grade 15's.

Mr. Murphy. Twenty-three.

Judge Litt. Yes.

Mr. Murphy. Are you assigning to the 16's the black lung work, or is that all going to the 15's?

Judge Litt. We have been assigning work, but it is questionable as to how much we could have done under a 1983 position description which we put in place as a result of some changes in the number of judges. We were informed by OPM that we could not permit more than one judge-year of grade 15 work to be performed in any grade 16 office. At the time, Washington had 44 positions at the grade 16 level, and that meant that by OPM standards we could only assign 2 to 3 percent of that work. We in fact did more because we had a large contingent of law clerks supported in the Washington office almost working exclusively on black lung work. We used our judges on itineraries in the black lung area to hear cases and direct the law clerks in working for them.

As we have gone further in order to attempt to get out larger numbers of cases, we have informed OPM that we were not following their directive. They have now changed their statement and stated that under the 83 position description we can in fact assign judges temporarily to the grade 15 work but that we would be subject to reclassification. I am not so sure that our judges would agree to hear a significant amount of lower graded work—and I use that in quotes—if they are going to be subjected to a reclassification of their positions down the road.

But it is not the key problem in how to resolve the issue of black lung cases, because we can do it even if we have to agree to continue this burden that we have labored under for many years. We have positions where we can in fact ultimately move and obtain the resources, I believe, that will resolve the problem. It just makes it easier. It makes it quicker. And in my opinion, but I am not sure it is shared by all, it is certainly fair.

Mr. MURPHY. What is the production, per year, in number of cases in your office?

Judge LITT. Our budgeted fiscal year 1985 black lung cases were 5,400 cases with a 500-case carryover from a borrowed judge program from the Social Security Administration in the last quarter of 1984. So, we had a 5,400 budgeted number and 500 cases which were produced by an excellent group of SSA judges that we had been able to bring on board, and I think two Interstate Commerce Commission judges.

We are running now at close to 7,000 cases a year through a continuation of the borrowed judge program. We have borrowed for a 4-month period seven additional Social Security judges. We have one additional Interstate Commerce Commission judge we borrowed. And we have a law clerk program where we have ex-law clerks from our own office principally and retired judges who have experience in trying and writing cases, working for us as law clerks. That has been very successful in helping to reduce primarily the time between when a case is heard and when a decision comes out. Because of the press in reaching for 7,000 cases a year, which we were attempting to do, we were finding that the case would be heard, but you might have to wait 14 months before you saw a decision. We have been able to tremendously reduce that time due to the law clerk program and outside contracts.

Mr. MURPHY. We are going to be running out of time, gentlemen.

Do either of you gentlemen have any questions to ask them, then we can let them go? Mr. Petri.

Mr. PETRI. I had a question or two on my mind.

Mr. MURPHY. Please do.

Mr. PETRI. What would be a reasonable target for the time it took to reach a decision on one of these cases?

Judge LITT. It takes roughly a year to process the average case, even if we had a full complement of all resources, just the mere mechanics of handling the case. We have usually considered a year as work in progress. And anything beyond that in the black lung program would be considered as a backlog. Other case areas would vary. A longshore case generally takes only around 9 months. So, anything beyond 9 months in a longshore area would be considered backlog. An OFCCP case takes 4 years, 3 years, because of the processes. So, that's how we reach our determination. That is the basis of the numbers that we use.

Currently, we would say 7,000 cases would in fact be work in progress. If we had the correct complement of judges on board, it would take 1 year to process each case on average.

Mr. Petri. Is there much of a difference between judges? Do you assign the same number of cases to each judge? Is there a standard workload? Or do you have some judges who don't have a backlog because they have three sessions a day instead of two and work evenings? Or can't they do that because people like stenographers or court reporters won't work overtime?

I worked as a law clerk once. We had a 5-year backlog and took care of it in a year by meeting Saturdays and three sessions a day and getting attorneys who had lots of cases to schedule all of them at once in a particular part of the Federal circuit. There are lots of administrative ways of expediting things if you're willing to be flexible and work overtime.

Judge Litt. We have speeded up the machine quite a bit. When I first came to the Department, we were assigning 13 to 14 cases on an itinerary. Almost all cases are heard by a judge that travels. We run into the syndrome of a hotel room. If the room isn't filled at night, then you lost it, because there's nothing to sell the next morning. We send judges on itineraries now where they are hearing in a grouping of 22 cases assigned, somewhere on the average of 14 to 16 cases disposed of. We have tried to cut down the continuance rates, but as we set more and more hearings, we are running into opposition from the bar and from claimants who request additional time, the time to get a lawyer, and sufficient time to prepare their case.

So, there is a limit to how many cases we can in fact hear or set. We also run into limitations of how much our judges can travel. Every judge in the system is now traveling at least 1 week a month.

Mr. Petri. If you do that, the advantage falls in the claimant's court rather than them being frustrated because it's in your part. I mean, that's a different kind of a backlog.

Judge Litt. We have a very large number of claimants who have had cases set for trial who have requested continuance. And it is almost invariably claimants that ask for the continuances. I brought a recent printout which shows the number of cases where continuances have been requested. Some of them run up to half of the set itinerary. Usually we have had situations where, if we don't accede, we sometimes get a letter from one of the Congressmen asking us to be more reasonable.

It is not an easy situation to resolve. We have one letter—I will leave the individual unnamed—who has requested that we put off all black lung cases for 8 months while he did other work, and it was too trying for him to get to these cases. And it was joined in by the opposing counsel, who said, yes, you ought to grant this. And we are in the position now of denying it. I think I signed the letter the other morning.

It is a serious problem of how many cases we can hear and how many we can set. We have speeded the machine up to the point where I think it's not going to be easily speeded up much more without causing disallocation among the claimants and as to whether they are getting a fair shake.

Mr. MURPHY. Mr. Wise.

Mr. WISE. Thank you, Mr. Chairman.

Judge Litt, Judge Ramsey, it is good to see you again. They have also been on the road as far as the rest of our hearings go.

Real quickly, it is not practical to hire temporary ALJ's, and retired ALJ's to try to work in the system? As I understand it, there are some limitations there? You have got problems? You said moving 16's to do 15's work won't solve the problem although it would be a reform and probably necessary.

If we are going to get rid of this backlog, it still seems to me that we need to be hiring more ALJ's. I understand you can't take that position, but what you're telling me is that the system isn't going to handle the number of cases in a workable time unless the step is taken of hiring more ALJ's. That brings up the legislation that I have introduced to require 10 more ALJ's be added.

Could you comment on that?

Judge LITT. In your prefatory remarks Congressman Wise you indicated that I have certain limitations on what I believe I can comment on. Additionally, these matters are before Secretary Brock. He does have a task force. He has heard my views as to how we can resolve it.

We are very sanguine that there are solutions that will bring this caseload down to not just tolerable limits but with no backlog without about 3 years and that the average age of case will not increase from what it is, from what we expect it to be by the end of this year, which is about a 2-year delay. If we did nothing, it would probably grow longer as in Congressman Pease's report from the GAO indicated. But, of course, that is already not viable because under our current projections of 7,000 cases a year, which we are currently doing, it would only take roughly, I think, 7½ or 8 years to reduce the backlog to the 1 year on average.

I mean, we have made tremendous strides. Frankly, the department has been very supportive and, I think, under the current circumstances can be expected to continue to be supportive.

I just am not free to comment on options which go beyond what I have given the secretary and what he currently has before him.

Mr. WISE. I appreciate that. As the analogy was made earlier in the testimony, this was a mouse working its way through the snake. The mouse has obviously gotten to you. But I just caution that you may feel sanguine about it, but there are a lot of us working on legislation who do not feel at ease perhaps because we are not privy to what you are proposing. And this could well turn out to be, in the name of an old movie, the Mouse that Roared.

So, I do hope that we do hear something soon as to what those proposals are.

Judge LITT. I am not going to use that favorite phrase trust me, but we have gone from 5,400 cases to 7,000 cases in less than a year. And I think that displays certainly an interest in the Department and an understanding on our part at the office of administrative law judges what job has to be done.

Mr. WISE. Thank you.

Mr. MURPHY. We have time for one last one.

Judge Ramsey, has the DOL administration management office assisted in your spacing problems? Is there anything Congress can do? How are you making out? Apparently you are expanding rather rapidly.

Judge **Ramsey**. The department has been supportive. We have submitted plans to the Department. They were promptly approved. They have given us all of the assistance that they can. The ball is now at GSA. We are patiently or impatiently——

Mr. **Murphy**. Boy, there's a tough outfit.

Judge **Ramsey**. I will merely say that GSA has had the problem for some time. They have been examining it, reexamining it.

Mr. **Murphy**. We have trouble getting a desk from them.

Judge **Ramsey**. We now find ourselves in the position where we have four and five attorneys in a room properly designed for one or two. We need the space. It is available to us as soon as we can knock some walls out.

Mr. **Murphy**. I will discuss with Secretary Brock our willingness to join with him in urging GSA to move a little more rapidly than they usually move.

Judge **Ramsey**. I would appreciate that, sir.

Mr. **Murphy**. OK.

We have a few additional questions which, because we have a roll call and I don't want to hold any of you here until we return, we will submit to you in writing. There will be about two or three. We would request that you respond to our staff on those.

[The information follows:]

The following is a list of additional questions asked of the U.S. Department of Labor.

1. How many black lung cases, where the OWCP found no entitlement, went to informal conference? How many of these, after the conference, did OWCP then put into a grant status?

2. You estimated that 6,000 cases would be referred to the Office of Administrative Law Judges in FY 1985. How many have been referred to date and how many do you project for referral for the remainder of the fiscal year?

3. How many case filings were made in FY 1984 and FY 1985?

4. How many of these new filings were subsequently requested to be referred to OALJ in FY 1984? FY 1985?

5. For only pre-1982 cases, provide the number of cases disposed of in each month from FY 1979 to date? For each month between FY 1979 to date, provide the number of cases granted. Break down the answer to A and B above to show Director cases and RO cases.

6. Please provide the same information in "5 above" for all cases filed under the 1981 amendment from inception to date.

7. By month from 1980, provide the number of attorney fee requests filed and the number disposed? How many attorney fee filings are not pending? Please provide information by each state.

U.S. Department of Labor,
Washington, DC, October 18, 1985.

Hon. Austin J. Murphy,
Chairman, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Washington, DC.

Dear Mr. Chairman: Thank you for your letter of September 12, 1985 concerning statistics on the processing of black lung claims.

On October 1, you Division of Coal Mine Workers' Compensation (DCMWC), which processes black lung claims, changed computer contractors and systems. Because of this transition process and limitations in our previous record keeping systems, not all of the data which you requested is currently available. I have endeavored, however, to provide you with as much information as possible in answer to your questions.

Through August of Fiscal Year 1985, 800 informal conferences have been held on black lung claims. During the Fiscal Year 1985, we referred and the Office of Administrative Law Judges (OALJ) docketed a total of 8045 contested black lung cases.

During Fiscal Year 1984, DCMWC received 12,335 new black lung claims. Through August of this year, 9005 new claims have been received. We anticipate receiving as many as 819 more this year for a projected fiscal year total of 9,824. Statistics are not available which show the number of FY 1984 and FY 1985 claims that have been referred to the OALJ.

I have enclosed three tables which provide additional statistical information. The first shows the numbers of approvals, denials and total decisions on claims filed prior to the 1981 Amendments to the Black Lung Benefits Act. These numbers, which are for calendar years 1979 through 1984, represent initial decisions within DCMWC, and do not include reversals there or after appeal. Table 2 shows decisions on claims filed after January 1, 1982, the effective date of the 1981 Amendments. These figures too represent initial decisions. The division of the data between Director (Trust Fund) or RO (responsible operator) claims was not made unitl the year 1984. Table 3 concerns attorney fee requests. During calendar year 1984, 2055 fee requests were processed. Compilations of this data by month were not available unitl January of this year. A further breakdown by state is not available. As of the end of August, 156 attorney fee requests were pending resolution.

Your concern in this matter is appreciated. If I may be of any other assistance, please let me know.

Sincerely,

Susan R. Meisinger,
Deputy Under Secretary.

Enclosure.

TABLE 1.—1978 ACT CLAIMS

	Approvals	Denials	Total
Year:			
1979	39,731	49,823	89,554
1980	40,067	94,536	134,603
1981	9,131	40,137	49,268
1982	1,684	3,877	5,561
1983	485	1,206	1,691
1984	10	88	98

TABLE 2.—1981 ACT CLAIMS

Year	Approvals	Denials	Total
1982	129	4,513	4,642
1983	607	11,836	12,443
Director (trust fund):			
1984	276	6,928	7,204
1985 through August 1985	114	3,619	3,733
RO (responsibie operator):			
1984	270	5,326	5,596
1985 through August 1985	120	3,569	3,689

TABLE 3.—ATTORNEY FEE REQUESTS CALENDAR YEAR 1985

	Received	Processed
Month:		
January	108	151
February	91	108
March	97	128
April	117	100
May	120	98
June	85	107

TABLE 3.—ATTORNEY FEE REQUESTS CALENDAR YEAR 1985—Continued

	Received	Processed
July	167	208
August	172	185
Total	957	1,085

Mr. **Murphy**. Thank you very much, DOL people, for being with us.

We will reconvene in about 10 minutes for the final witness of the morning. Thank you.

[Recess.]

Mr. **Murphy**. We will reconvene.

The next witness is Mr. John Jarvis, legislative representative, United Mine Workers of America. Mr. Jarvis, good morning. I am sorry to keep you waiting.

STATEMENT OF JOHN T. JARVIS, UNITED MINE WORKERS OF AMERICA

Mr. **Jarvis**. Mr. Chairman, on behalf of the mine workers, I would like to thank the chairman and the committee for their efforts in doing the necessary oversight to try to deal with the serious problem of the backlog.

We would also like to express our thanks in terms of the true bipartisan effort that it has been.

I am here today to express, if nothing else, the frustration that many members of the committee have heard in the several field hearings that have been held, the frustration of our members, black lung victims, who have to wait a long time with a tremendous sense of uncertainty, never knowing exactly when the final resolution of their case may be. That is a tremendous hardship.

As a DOL study showed last year, the average black lung recipient is not a wealthy person. The income to the household in total is usually less than $10,000. So, we are talking about people who are ill, who are not wealthy, and who have to live with this great uncertainty.

So, the hearings that have been ongoing are extremely important, we feel, in terms of trying to get a resolution to the backlog problem.

We have been encouraged by what we have not only heard here this morning but by the activities at the Department of Labor, the creative thinking that new ideas will come to this program and that efforts will be made to eliminate the backlog. I must say that, despite the willingness of people to address this problem, I think it was the activities of this committee and many of the Members of Congress that has prodded, to a certain extent, the current thinking that is going on on this issue. But for whatever the reason or however it got started, I can express to you that the mine workers are very appreciative of the fact that the Department of Labor, and that the Congress, in both Houses, people are focusing on this problem.

It is a real problem for our members. It is a real problem for the victims of black lung. This is such an important program, it is a pace setter in many ways in terms of compensation programs in the area of health. We want to—and it has always been a concern of the mine workers—to make this program a model program, to make it work, to show that Government action of this nature can be effective in terms of compensating victims of disease related to the workplace.

With that, Mr. Chairman, I would just say once again thank you. If there are any questions, I will be happy to try to answer those.

[The prepared statement of John Jarvis follows:]

PREPARED STATEMENT OF JOHN T. JARVIS, UNITED MINE WORKERS OF AMERICA

Mr. Chairman and members of the subcommittee:

I am John Jarvis, national legislative representative for the United Mine Workers of America. On behalf of the members of the UMWA and the thousands of victims of black lung. I want to thank you for conducting this series of hearings.

As you know, Mr. Chairman, black lung is a generic legal term for several lung diseases that are caused by breathing coal mine dust. The diseases also have had such names as miners' asthma, silicosis, emphysema and coal workers pneumoconiosis [CWP]. Despite the variety of names, these diseases are all caused by breathing coal mine dust and result in the same symptoms—coughing, tightness of the chest, shortness of breath and inability to perform everyday activities such as walking up steps.

Black lung has been recognized as an occupational disease for almost 50 years. British physicians began to question, in 1934, the effects of long exposure to coal mine dust. In 1942 they identified coal workers' pneumoconiosis. A slow, progressive and often fatal disease. The American medical establishment. However, ignored the mounting evidence for several more decades. Because of the complacency of American doctors. Government did little to provide assistance to victims of black lung. Alabama was the first State to provide compensation for CWP in 1952. Virginia soon followed the example but pressures were exerted by the coal industry and the law was quickly repealed. It was more than a decade later that Pennsylvania officially recognized the disease as compensable.

In the almost universal absence of compensation coverage for medical benefits, the UMWA welfare and retirement fund spent millions of dollars for the diagnosis, treatment and rehabilitation of miners afflicted with black lung. The funds' medical staff recognized that these miners had more respiratory infections than other miners and that their infections lasted longer. Some became so ill that the required hospitalization for 2 or 3 weeks several times a year. Confronted with a mounting toll of pulmonary cripples, the fund embarked in 1952 on a long term program to develop professional understanding of lung diseases among coal miners. The fund held medical conferences, brought pulmonary experts from Europe to speak with coal field doctors and published articles in medical journals explaining the devastating nature of these diseases.

It was not until 1969, however, that their work paid off in the form of a Federal statute that provided compensation and mandated the elimination of this preventable, man-made disease. Today about 140,000 miners and 260,000 widows and dependents receive benefits under the Social Security and Department of Labor Black Lung Programs. The benefits that they receive are, in every sense of the term, life support benefits. A 1983 study by the Department of Labor showed that the average household income for black lung beneficiaries was $9,870. More than half of the beneficiaries had a total income of less than $9,000. The benefits are somewhat more important economically to widows of black lung victims. The DOL study showed that more than a third of the widows had a family income of less than $7,000 per year.

Today's hearing, of course, is directed more at those people who are in the process of filing claims for benefits than those who are already in the program. But it is important to know something about them. The vast majority of these people are poor, elderly and ill. Their lives often are filled with pain and sleepless nights. The simplest pleasures are denied them. And, unlike many of us, they do not have the luxury of time.

Unfortunately, they are forced to bide their time once they apply for black lung benefits. The program has become extremely complex and is proving to be a bureaucratic nightmare for some black lung victims. Never-ending delays are the order of the day. In far too many cases, a black lung victim faces years of delay from the filing of a claim to the final rendering of a decision. The situation has become extremely unfair for the people whose health has been destroyed by their employment.

Congress created the Benefits Review Board in 1972 to provide prompt and efficient due process of law for all parties involved in claims for benefits arising out of the Longshoremen's and Harbor Workers' Compensation Act and the Federal Coal Mine Health and Safety Act. The Board, consisting of three members appointed by the Secretary of Labor, is supposed to perform the same judicial appeals review functions that the U.S. district courts exercised prior to 1972. It is the final step in the administrative review process, hearing all appeals from the Department of Labor's Office of Administrative Law Judges.

The severe backlog of cases at both the ALJ level and at the Benefits Review Board is cause for serious concern. The Board had a backlog of 2,239 black lung cases as of September 30, 1981. Within 3 years the backlog of pending cases had more than doubled: As of September 30, 1984 the Review Board reported a pending docket of 5,234 cases. Furthermore, no significant improvement can be expected in the near future. The Office of Administrative Law Judges currently has a pending backlog in excess of 20,000 cases. It can be expected that many of these cases eventually will end up on the Review Board's inventory of cases.

The inability of the review process to function efficiently has caused a great deal of consternation and uncertainty among black lung claimants. In many cases, a decision by the Deputy Commissioner in favor of a claimant automatically is appealed by the coal companies. The review process at the ALJ level currently can take as long as 3 to 4 years. A further appeal to the Board can extend the process 2 to 3 more years. In the meantime, the black lung victim is left in limbo, not knowing if his benefits will continue or whether he will be told to repay the money he received in good faith.

It is extremely unfair to keep these victims waiting for years, ill at ease and fearful of the outcome, until a final decision is reached. It is also very unfair to seek repayment from these senior citizens in cases in which the initial determination of an award is overturned. Elderly former coal miners are not among the privileged in our society. Almost without exception, repayment of an award, usually years after it is received, is a severe hardship and threat to their economic security in their declining years. It serves no national purpose to put these unfortunate people through the wringer. The end of benefit payments is punishment enough.

There is an obvious need to increase the staffing levels of the Benefits Review Board and the Office of Administrative Law Judges. Congress passed legislation in late 1984 to increase the size of the Board from three to five members and authorized the Secretary to designate up to four ALJ's as temporary members of the Board. This undoubtedly would help relieve the tremendous bottleneck but, to date, the Department of Labor has not taken the necessary actions to implement the new congressional directives.

Mr. Chairman, you and your colleagues can correct a long-standing, nagging and unncessary wrong by insisting that sufficient funding be appropriated to clear up the backlog at both ALJ and BRB levels. It would take relatively little money for a short period of time to make the system work for the people, not against them. The number of black lung claims originating today is much lower than it once was. If we clear up the backlog now, we can return to current personnel levels quickly, and with no fear of creating new delays in the future.

Thank you for this opportunity to tell you of our concerns.

Mr. MURPHY. Thank you, Mr. Jarvis.

Do you concur with the testimony that was given to us by the DOL earlier this morning, Ms. Meisinger, when she stated that they are practically current with their initial determinations? Do you find any delay in initial determinations? Or do you find, as indicated this morning, that the delay is at the ALJ and review board?

Mr. JARVIS. From our soundings—and I must say that we do not have a system in place to make an accurate and scientific survey of the population, but just from the letters that we receive and the calls that we get from our members, I would agree with her statement. I think that the problem is, except for in the Charleston area, really at the ALJ level and at the Benefits Review Board level. The Department is making a good effort to speed up the initial determination.

Mr. MURPHY. Do you believe that the 1981 amendments made any change or created any problem with the backlog?

Mr. JARVIS. No, I don't really think that the passage of the 1981 amendments is necessarily related to the backlog, except to the extent that, obviously when you change any law in such a major fashion, it causes a number of internal things within the Department that must occur so that they can begin to administer the new law. And I am sure that that played a role. But I would not put the backlog and 1981 amendments together in any sense.

Mr. MURPHY. I might say, without objection, Mr. Jarvis, your entire statement that was submitted to us in writing will be submitted into the record.

Mr. JARVIS. Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Wise.

Mr. WISE. Thank you, Mr. Chairman.

This doesn't go directly to the backlog, although I think it helps contribute. There was testimony heard, I know, in the Uniontown hearing that the provision dealing with responsible operators meant that there was a tendency by operators to appeal every case. Do you share that observation? Do you think that is a cause for the backlog?

Mr. JARVIS. Obviously the companies' continuing to appeal at the rate that they are appealing, yes, does contribute to the backlog. I think, yes, directly, to answer, that is a serious concern.

I think, also, though, it tends to reflect the general mood of society. I mean, litigation in all areas has grown so rapidly. Everybody is suing everybody else. Everybody is appealing everything.

Many times it is in the best interests of the corporation just to continue to appeal and appeal and appeal. It is less costly than actually paying the benefits. And that does contribute.

Mr. WISE. Mr. Jarvis, let me just note, that must have been a sudden change in society, because when I was practicing law I did not notice that economic incentive.

Mr. JARVIS. My comments were probably less than judicious.

Mr. WISE. Well, I guess, both Mr. Jarvis and Mr. Chairman, we are going to have to wait and see. I think many more questions right now wouldn't be to much purpose because we're waiting to see what steps the Department of Labor takes and then if the Congress has to act.

I would just like to thank both Mr. Jarvis and the United Mine Workers, who have been very, very active. I know in your district, Mr. Chairman, and I know in my district the United Mine Workers has been very active in bringing this forward, also in representing, which goes unnoticed sometimes, their own membership in these proceedings. We took a lot of testimony from both district 17 and district 31 claims representatives in pushing forward to get some reform. I assume this will probably be the last hearing. Hopefully, we won't need any more hearings. But I really appreciate the chance to participate with you and also the many steps you have taken to bring this matter forward and, I think, getting some substantive changes made.

Mr. **Murphy**. That is all I have, too, Mr. Jarvis. Thank you very much. I do appreciate your comments.

We appreciate the testimony of your officials and members in the regions to which we have been.

Mr. **Jarvis**. Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you.

With that, the hearing stands adjourned.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

INVESTIGATION OF THE BACKLOG IN BLACK LUNG CASES

MONDAY, SEPTEMBER 9, 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to notice, at 11:10 a.m., in the conference room, Luzerne County Courthouse, River Street, Wilkes-Barre, PA, Hon. Austin J. Murphy presiding.

Members present: Representatives Murphy, Gaydos, and Kanjorski.

Staff present: James Riley, majority legislative analyst, Dorothy Strunk, minority senior legislative associate.

Mr. **Murphy.** This is a hearing before the Subcommittee on Labor Standards of the full Committee on Education and Labor in the Federal Congress.

We have convened today's hearing of the Labor Standards Subcommittee here in Wilkes-Barre as part of our continuing investigation of the massive backlog of black lung cases in the Department of Labor on the Federal level. In May, we conducted our first field hearing in Uniontown, PA, to hear testimony from black lung victims, United Mine Worker officials, and attorneys who are engaged in the practice of compensation law. In June, we went to Wise, VA, to hear similar testimony. Eventually, we also questioned senior Labor Department officials at our Washington, DC, hearing in July.

The information that we have obtained at these earlier hearings leads us to certain conclusions regarding the way that the Black Lung Program is presently administered.

Among the problems we have identified are the extremely low rate of approvals, 4 percent at the initial determination stage. This simply dumps the entire responsibility for the adjudication of claims on the Office of Administrative Law Judges ensuring a backup at that level. It is also clear that additional personnel will be needed in the Office of the Administrative Law Judges.

Consequently, I have formally requested an increase in the budget for that office.

Finally, we believe that the so-called GS-15/16 split has prevented many of the judges of the Department of Labor from spending a majority of their time on black lung cases because of the risk that their positions would then be down graded. I have introduced legislation, H.R. 3194, to alleviate this problem.

There are, of course, other factors which have contributed to the black lung backlog which we are continuing to examine and hope eventually to resolve. We could not conclude our hearings without a trip to the anthracite coal mining region. I want to thank my colleague, Paul Kanjorski, who will be our first witness today, for inviting the subcommittee to Wilkes-Barre, and his fine staff in making all of the arrangements. I also want to thank my colleague, Congressman Joe Gaydos, from Allegheny County, PA, who accompanied me on this trip this morning and who serves as a senior member on the Education and Labor Committee, and of course his attendance makes this hearing possible.

I understand that we have written statements from Congressman Joe McDade and Congressman Gus Yatron who could not be with us today, and without objection their testimony will be made a part of the official record. I have Mr. Yatron's statement here in my folder, and I'm told that a copy is to be provided to the official reporter. Mr. McDade's statement will be read by a member of his staff.

[The prepared statement of Hon. Gus Yatron follows:]

PREPARED STATEMENT OF HON. GUS YATRON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

I would like to commend the Subcommittee on Labor Standards for holding this hearing today and to thank its Chairman, Congressman Murphy, and one of its Members, Congressman Gaydos, for their leadership in pursuing a solution to the very serious problems in the adjudication of black lung claims. Congressman Kanjorski and I have adjoining Congressional Districts and we both represent part of Carbon County. As such, we also share a deep concern about the consequences this administrative quagmire has had for our constituents. Along with many members of the Pennsylvania Congressional Delegation and our colleagues from other coal mining areas, I know we will all continue tc attend to this problem until the backlog of cases has been substantially reduced and made manageable.

The statistics of this problem have been repeated many times, but they never fail to elicit surprise and then questions borne of frustration and disbelief. How has it been possible for the backlog to reach 21,000 cases in DOL's Office of Administrative Law Judges and 5,200 cases in the Benefits Review Board? With cases increasing by 5,000 each year, how will the backlog's size ever become more manageable? Why in my own District alone are 2,000 of my constituents still anxiously awaiting judgement in their cases and appeals? Our frustration makes us search for the reasons for the bureaucracy's extraordinary failure and what we as legislators can do to help. All of this may also lead us to wonder about other causes for the failure, ones that may indicate a lack of commitment to carry out the will of Congress.

Many present today are no doubt searching for answers to these questions. The need to solve the backlog problem cannot be underestimated and a sense of urgency in doing so is necessary. Coal miners have made vast contributions to the economy of this nation. When they work hard and spend 25 years in the mines, 95 percent of them contract black lung disease. They have sacrificed health and well-being and their families have suffered with them. We hear the numbers over and over again and we must never forget the human tragedy associated with each one of them.

I know that one of the fastest ways the Department of Labor could begin to more adequately reduce the backlog is to increase the number of Administrative Law Judges hearing cases. An upgrading of the work of the black lung AJL and having all available AJL's hear black lung cases should begin immediately. The need to do this has been recognized by DOL itself for some time. This summer, legislation was introduced by Senator Rockefeller and Chairman Murphy amending the Black Lung Benefits Act to mandate such a change. I certainly support this amendment and commend my colleagues in the House and Senate for their wisdom and initiative.

In closing, I would again like to thank the Subcommittee for this opportunity to express my concern. For the sake of all my constituents still suffering from black lung disease and waiting endlessly for their due compensation, I urge you to continue to persevere in your endeavors to resolve this serious problem. I stand ready to help in every way possible and look forward to continuing our cooperative efforts on behalf of the black lung sufferers and their families.

Mr. **Gaydos**. I'm going to be very very short. No. 1, I want to congratulate this vibrant community here. Regardless of what people say about Wilkes-Barre and the Scranton area, I find it stimulating when I come up here. You've got a beautiful courthouse and I'm very happy to be here. You have the same type of mixed ethnic background people as we have down in the Pittsburgh area. In fact a large number of our people have relatives up in this immediate area, so that affinity is there, and the closeness is there.

I have nothing more to say other than to remind my colleagues and maybe the people here that black lung legislation was passed over 15 years ago. It was a concept of a good Congressman who's been retired now for a good number of years, Congressman John Dent, an old coal miner from the Pittsburgh area. It was his dream and vision at that time, and I happened to be on a committee during those years serving under him, and I happened to at that time have been able to vote for the black lung legislation, support it, explain it, and I want you to know that I think the concept is great. I think those detractors from black lung, enemies at that time, finally came around and finally admitted that it was good legislation, so we're here today primarily under the leadership of Congressman Murphy to try to make this act work like it was intended to and supposed to work, like it was envisioned at one time. So I'm very happy to be here. I want to close by saying that I have some old friends here from the senate and the house and I'm very glad to see them here today. They look good, and I'm very happy to be here.

Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you, Joe. I likewise join in welcoming our former colleague in the State senate and State house for being with us this morning.

Our first witness scheduled is our colleague in the Congress, and your Congressman from this district, Congressman Paul Kanjorski who will have an opening statement and then join us here at the rostrum.

Mr. Kanjorski.

STATEMENT OF HON. PAUL KANJORSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. **Kanjorski**. Mr. Chairman, I welcome the Subcommittee on Labor Standards to Wilkes-Barre today, and I commend you for your initiative in holding hearings around the country to discuss the problems that retired mine workers and their widows are having with their claims for black lung benefits.

The problem is particularly acute in the Wyoming Valley, the heart of America's anthracite coal industry, home to tens of thousands of former mine workers and their families.

Generations of northeastern Pennsylvania residents have labored industriously in coal mines to extract the coal which heated our homes, stoked our furnaces, and fueled our industrial revolution. Those of us who have benefited from their labor owe them an eternal debt of gratitude. As Winston Churchill said of the Royal Air Force during World War II, "Never have so many owed so much to so few."

Mr. Chairman, I have remarks that are rather extensive, over 16 pages. At this time I would ask that the committee accept that testimony as given. I'd like to go off and be extemporaneous if I may in the presentation of my testimony today.

Primarily, I'd like to tell you that my working knowledge with the black lung and pneumoconiosis and anthracosilicosis is not something new since my election to Congress. I had a great opportunity from one of your former colleagues in the Pennsylvania Senate, and he happens to be present today, in the name of a former Senator now, Frank O'Connell. In 1966 then Representative Frank O'Connell asked my brother and I, who were practicing attorneys in Wilkes-Barre, to make the initial study in the Commonwealth of Pennsylvania of our anthracosilicosis problem. Because at that time it was impossible for the miners in Pennsylvania to get adequate hearings on a State level to receive their anthracosilicosis benefits.

After undertaking that commission from Governor Shaffer and spending about 6 months in study, we concluded that it was absolutely physically impossible to have the proper hearings adjudicated by the referees then in place in Pennsylvania, and recommended that the Commonwealth create an additional four referees to handle most specifically anthracosilicosis cases. With the advent of that change and the action by the State legislature as recommended by the Governor at that time, the case load and the backlog of the black lung and anthracosilicosis in Pennsylvania was broken within 18 months. So that, thereafter, for a period of 10 years in which I had the pleasure from 1970 to 1980 to serve as a referee in Workman's Compensation in Pennsylvania, a coal miner, after petitioning, received a hearing within 18 months and an adjudication on the subject.

Now on the Federal level as I've gone to Congress, and having read a General Accounting Office study commissioned by Congressman Don Pease of Ohio, we now discover that the backlog in the Federal system is as long as 14 years. That literally thousands and thousands of cases are languishing in offices and appeals boards throughout the Federal system, and the beneficiaries, who are all senior citizens in age and have limited lifetimes remaining, are all called upon to wait, to be in the state of crisis, and to go through the nerve-racking conditions of legal proceedings. In many instances, ridiculously so, since their claims are quite legitimate and the speedy offering of a hearing and testimony and the adjudication of the same could afford them a relaxed retirement as opposed to an anxious and crisis-ridden retirement.

It's for those purposes that when I went to Congress and I had the fine opportunity of serving with you gentlemen in the Pennsylvania delegation that I concluded that your work in this area of black lung to see what we could do about it was most important.

Now as an outside observer, not being part of the committee, I can say there are several aspects of the case that I look at. I think very clearly some of the procedures that we have taken in the early 6-month period of this year, that is the assignment of additional administrative law judges, will help. Two judges were reassigned in April of this year in Wilkes-Barre, and the backlog is starting to move a bit here in Wilkes-Barre. But the entire system is so clogged up that it seems to me that we have to have the administrative law procedure on the national level free up these GS-15/16 judges so that they can go between the various areas and departments to hear these cases at a faster rate and with more expeditious care.

The other thing that we can look at is giving them some more support personnel, either in the nature of law clerks and hearing stenographers, in court rooms, or whatever is necessary in a physical sense to allow them to get to this backlog as soon as possible.

Third, I think a bit of classification of the intent of Congress on this Act. It should be a liberally construed act with the intentions of providing care for those that have served. I think that the system within the last 5 years has clogged down more on a philosophical bent from the administration's standpoint than any other. I think it would be well placed if the Congress of the United States took affirmative actions, reasserted the liberal interpretation of these acts with speedy hearings and speedy purposes to attain the end, that is to provide the benefits to these needy people.

The other area that I would comment on that I ran across in the State of Pennsylvania, and I think I run across again in the Federal system, is the whole procedure of the administrative law judge. Now I fully recognize that that is not necessarily a jurisdiction of this committee, but I think it would be wise for this committee to pass on the concept of whether or not there doesn't exist a conflict of interest, that the Department of Labor has under its jurisdiction the very administrative law judges who become the final tryer of fact and law in these cases. I seem to think that the American tradition lends itself, if not to an absolute conflict of interest, at least to the appearance of a conflict of interest. I would think that it would be well worth our while to examine the possibility of taking the administrative law judges out of the various departments to which they serve and to put them into some separate judicial function area, whether it be in the Justice Department or some creative special independent agency administering administrative law judges, so that they would be free to provide the standard and judgment when they hear these cases without fear of contradiction from their superiors or those people in the department which have a direct effect on their actions.

I cannot substantiate the facts, but I have heard and have seen it reported in the press over the last several years that, in fact, in this administration there was a time when percentages were used to indicate to administrative law judges that they did not expect a certain amount of awards, that they expected a certain amount of turndown. And that type of justice is justice denied.

So I would suggest if we could clear the conflict up, if it exists, or at least the appearance of its existence, we would be doing well to serving the appearance of good justice to our constituents.

Without further ado, I ask that my statement be made part of the record as it was originally conceived. Again, I want to thank you very much for coming to Wilkes-Barre and giving the time. I know how pressed and how many times we've tried to schedule this hearing and have had difficulty with it. I particularly want to express my thanks to you, Mr. Murphy and to you, Mr. Gaydos, for going out of your schedule. I know how busy your schedule is because I know what it would do for me to move to your district to have a hearing. But we here in Wilkes-Barre appreciate this because it affects thousands and thousands of lives, and the action that you take in your committee and that you bring before the House of Representatives and eventually pass into legislation, will affect the happiness and the anxiety of thousands of my constituents. And on their behalf, I thank you.

Mr. MURPHY. Thank you, Mr. Kanjorski. Without objection your remarks will be submitted in total in the record.

[The prepared statement of Hon. Paul E. Kanjorski follows:]

OPENING STATEMENT OF HON. PAUL E. KANJORSKI, A REPRESENTATIVE IN CONGRESS FOR THE STATE OF PENNSYLVANIA

Mr. Chairman, I welcome the Subcommittee on Labor Standards to Wilkes-Barre today, and I commend you for your initiative in holding hearings around the country to discuss the problems that retired mine workers and their widows are having with their claims for black lung benefits.

This problem is particularly acute in the Wyoming Valley, the heart of America's anthracite coal industry, home to tens of thousands of former mine workers and their families.

Generations of Northeastern Pennsylvanian residents have labored industriously in coal mines to extract the coal which heated our homes, stoked our furnaces, and fueled our industrial revolution. Those of us who have benefited from their labor owe them an eternal debt of gratitude. As Winston Churchill said of the Royal Air Force during World War II, "Never have so many owed so much, to so few."

Today, instead of gratitude, many retired mine workers find they have been afflicted with black lung disease, one of the most debilitating and uncomfortable afflictions known to man.

In 1969 the Congress wisely recognized that the federal government had an obligation to provide medical and financial assistance to the brave men who had developed pneumoconiosis as a result of their work in the mines. Title IV of the Federal Coal Mine Health and Safety Act established a benefits program for disabled mine workers. In 1973 jurisdiction over the program was transferred from the Social Security Administration to the Labor Department, and in 1978 the program was retitled the Black Lung Benefits Act.

The 1978 amendments created an enormous backlog of unprocessed black lung cases. At the administrative law judge level, the backlog increased from 484 cases at the end of fiscal year 1979, to more than 21,000 cases today. Roughly a 5,000% increase! Furthermore, today 78% of all cases take more than two years to be disposed of. At the Appeals Board level, the backlog has increased from 102 cases at the end of fiscal year 1979, to nearly 5,700 cases today. Again a more than 5,000% increase. The independent, nonpartisan General Accounting Office estimates that at current rates it will take over 35 years to reduce the backlog to a so-called "reasonable" level of "only" 6,000 cases.

Mr. Chairman, there is an old saying that "justice delayed is justice denied." That statement could not be truer than in this case. After years of backbreaking work miners are being hit twice; first when they develop black lung disease, and a second time when they experience agonizing delays in getting their cases heard by the Labor Department's administrative law judges and Benefits Review Board.

As a former administrative law judge for the State of Pennsylvania I can affirmatively state that this is a miscarriage of justice. Miners are actually dieing of black lung disease before their cases are resolved by the Labor Department. Earlier this year concerned House members wrote to the Labor Department to determine exactly how many miners have died over the past five years with cases pending before either an administrative law judge or the Benefits Review Board.

The truth of the matter is, however, Mr. Chairman, that if even one miner has died with his case pending, or if even one disabled mine worker has been denied needed medical benefits, it is one miner too many.

Today we will hear from those most heavily involved in this problem how it has affected their lives. We will hear from mine workers and their widows about how the delays have affected the quality of their lives. I hope the administration will be listening carefully because instead of moving aggressively to reduce the black lung case backlog, this year the administration has proposed making life even more difficult for disabled mine workers and their widows by denying them their annual cost-of-living adjustments. Fortunately, Congress decided not to follow this proposal and instead approved a full cost-of-living adjustment to make up for the effects of inflation in Black Lung benefit checks.

We will hear from several distinguished former Members of Congress who can provide historical perspective on how this problem was created, and their experiences in dealing with black lung cases.

Finally, we will hear from local attorneys who have practiced in this area and who can offer their insight into why these delays occur, and what can be done to reduce them.

Before we begin our hearing, Mr. Chairman, I'd like to note that while the administration has been trying to ignore this problem in hope that it will go away, a number of imaginative and creative proposals have been put forth in the Congress to address this problem. In addition to the obvious solution of simply hiring more black lung judges the proposals include:

- My bill, H.R. 2673, which would enable the Labor Department to temporarily borrow underworked administrative law judges from other federal agencies. I am pleased to be able to report that provisions similar to my bill were added by Senator Byrd to the Fiscal Year 1985 Supplemental Appropriations bill (H.R. 2577). Twenty-one of my colleagues in the House cosigned my letter to the conferees urging them to adopt this proposal. It has now been signed into law but has not yet been fully implemented by the Labor Department.

- A proposal put forth by Rep. Mollohan, myself, and other members of the Congressional Coal Group in a letter to Labor Secretary Brock urging the use of GS-16 administrative law judges to hear black lung cases. Under current regulations only GS-15 judges can hear black lung cases even though there are only 23 GS-15 judges to hear 21,000 black lung cases, and 64 GS-16 judges to hear about 6,000 non-black lung cases. Chairman Murphy has recently introduced a new bill, H.R. 3194, to allow GS-16 judges to hear more black lung cases. The Labor Department has responded to our actions by initiating discussions with the Office of Personnel Management to try and resolve this problem.

- A proposal to hire two dozen additional administrative law judges, several additional Benefits Review Board members, and additional supporting staff to reduce the backlog.

- A proposal to contract with more retired administrative law judges to hear black lung cases.

- A proposal to increase the number of law clerks for each administrative law judge so that each one can hear more cases.

- A proposal to reduce delays caused by claimants' inability to find attorneys by utilizing law students enrolled in clinical practice programs, under the supervision of their professors, to represent claimants.

- A proposal to hire private attorneys for a temporary period of time to hear black lung cases.

Mr. Chairman, some of these proposals will require Congressional action in order to be implemented. Other options can be implemented administratively, without any Congressional action. An example of what can be done administratively is my work to get the U.S. Labor Department to reassign two additional administrative law judges on a temporary basis to Wilkes-Barre to reduce the excessive black lung backlog in our area.

I hope that our witnesses today will discuss the relative merits of the various proposals that have been suggested and make recommendations to the Congress and the Administration on the most expeditious way to reduce the backlog and obtain for mine workers and their survivors the benefits they deserve and have earned.

Together, I am confident, we can make a better life for those who have given so much of their lives for us.

Mr. **Murphy**. Before we get on with the first panel, Mary Wright from Congressman McDade's office will submit his statement for the record. Ms. Wright?

Mr. **Gaydos**. Mr. Chairman, let me put on the record at this time if I may, that the suggestions by our colleague, Congressman Kanjorski, regarding the administrative law judges and their procedures seems to be a sound one. I do want to again, make it part of the record. We never thought about that aspect of it 8 years ago when we passed this legislation. So I, personally, feel that we in Washington are extremely fortunate that we have a man like Mr. Kanjorski who has looked at the practical aspect. The cases now, will be there to assist us and help in giving us some technical support and advice on this very sensitive legislation. So I want to commend Paul, I want to commend you for spreading on the record meaningful suggestions, and we'll be taking it up.

Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you. Ms. Wright?

STATEMENT OF HON. JOSEPH McDADE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Ms. **Wright**. The statement of Congressman Joseph McDade.

Thank you for allowing me to express my feelings about the bureaucratic nightmare that keeps thousands of people from getting black lung benefits. I wish to keep my statement short so you will have more time to hear testimony.

As you know, my family was involved with coal in the Scranton area and many citizens in my district probably have a relative that died as a result of black lung or a mine disaster. The issue of black lung compensation is not a partisan nor a budgetary one; rather, it is an issue that involves victims or their families receiving compensation for this terrible affliction.

The 21,000 black lung cases are being held up because of a bureaucratic shell-game. There are three problems: One, there is not a sufficient number of Department of Labor administrative law judges to hear the cases; two, black lung cases are classified as GS-15 work, therefore only GS-15 ALJ's work on them because of the civil service structure. GS-16 ALJ's cannot work on black lung cases; three, victims cannot afford to pay lawyers or sometimes even find lawyers to represent them since it takes years for a decision to be handed down on these cases.

I urge Secretary of Labor Brock to seriously consider taking action to alleviate the backlog. If nothing is done administratively through the Department immediately, Congress should take the matter into its hands.

Finally, Mr. Chairman, I commend you and all our colleagues who are taking an interest in resolving this situation which has created an abominable nightmare for thousands of victims, their widows, and their families.

Thank you.

Mr. **Murphy**. Thank you very much, Ms. Wright, and we thank our colleague Joe McDade for his concern, and we'll be seeing him back in Washington later this afternoon.

Our first panel is comprised of the victims and hopeful recipients of black lung, Mr. Peter Zinga and Mrs. Anna Scrippets. Would both Mr. Zinga and Mrs. Scrippets please come up and take the chairs?

Mr. Zinga could not make it.

[The prepared statement of Peter Zinga follows:]

PREPARED STATEMENT OF PETER ZINGA, OF SHICKSHINNY, PA

I, Peter Zinga, worked a total of forty-four (44) years in the coal mines. For twenty-nine years (1939 to 1968), I worked underground. The last fifteen years (1968 to 1983), consisted of working above ground, for the Corgans. My last employment was for Laurel Enterprises. My boss was Michael Corgan. Attached is a copy of my work history.

Many days while working at Laurel Enterprises, I got short winded. Michael Corgan saw what happened and would send me home. In all the other mines you very seldom see your boss, but at Laurel Enterprises, Michael Corgan was always around. So he saw how many times I was sick. In fact he made me do lighter work many times, because he knew I was ill.

Why did I work so long for so many years? I had a wife who was ill from 1968 and died in 1982 of cancer. Who would have paid all the bills if I quit work? How many times I prayed to God to help me get through the days. I was exposed to dust, fumes and gases. Anyone try and have that in their system for 44 years see what happens. At Laurel Enterprises I did strip mining and coal drilling. Also greased the breaker.

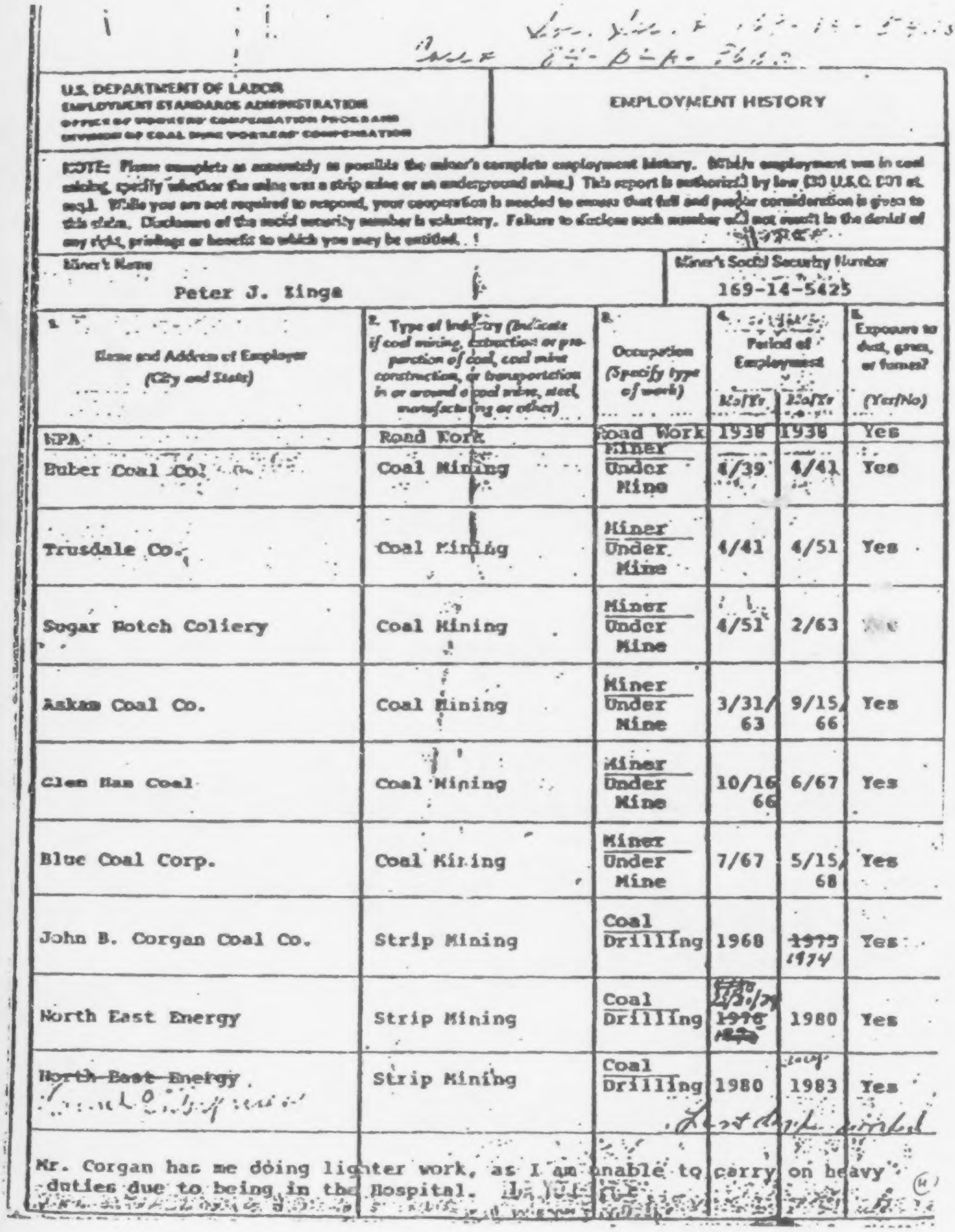
After a day's work of drilling I looked like a dark man many times from the rock and coal dust. I wish I had a dime for the many days I went to work sick. I had to stop the car almost every five minutes going to work, as I would throw up till it would be blood. Did Michael Corgan know that I was sick? He sure did.

I took more aspirin, bufferin, pepto and alka-seltzer than you can shake a stick at. I left the strip mines August 1983 under doctors orders. It was either that or be dead within the next few months or days. Right now the way I feel, at night I only get a few hours sleep. I can't sleep because I can hardly breathe. I can't walk very far any more because of my breathing. I sleep with three pillows. I first filed for black lung in 1969. I am on oxygen as I can hardly breathe. I use a pulma aide machine three times daily. Previously I was using a nebulizer since 1983. Enclosed are copies of the prescriptions for all my different medicines.

I remarried in May, 1985. My wife and I would like to try and enjoy the last few years together. I would like to get air conditioning for the house so I can breathe and rest and get our loan at the bank paid, which we took out to fix up the house. This is the least I can do for my wife. If it wasn't for her, maybe I would be dead by now.

I'm tired, and I just hope other miners who worked in the mines like I did do not have to go through what I am going throug to get my black lung benefits.

I am short winded and must take breathing pills every day. This weather does not help. Thank god we live in the country. I would be dead if we lived in the city. That's why I would like to see my wife have something nice, as she is disabled also. It's not easy when you worked 44 years in the mines. Enclosed is a picture of me after my hospital stay in 1983.



U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
DIVISION OF COAL MINE WORKERS' COMPENSATION

EMPLOYMENT HISTORY

NOTE: Please complete as accurately as possible the miner's complete employment history. (While employment was in coal mining, specify whether the mine was a strip mine or an underground mine.) This report is authorized by law (30 U.S.C. 901 et seq.). While you are not required to respond, your cooperation is needed to ensure that full and proper consideration is given to this claim. Disclosure of the social security number is voluntary. Failure to disclose such number will not result in the denial of any right, privilege or benefit to which you may be entitled.

Miner's Name: Peter J. Zinga

Miner's Social Security Number: 169-14-5425

1. Name and Address of Employer (City and State)	2. Type of Industry (Indicate if coal mining, extraction or preparation of coal, coal mine construction, or transportation in or around a coal mine, steel, manufacturing or other)	3. Occupation (Specify type of work)	4. Period of Employment Mo/Yr	Mo/Yr	5. Exposure to dust, gases, or fumes? (Yes/No)
WPA	Road Work	Road Work	1938	1938	Yes
Buber Coal Co.	Coal Mining	Miner Under Mine	4/39	4/41	Yes
Trusdale Co.	Coal Mining	Miner Under Mine	4/41	4/51	Yes
Sugar Notch Coliery	Coal Mining	Miner Under Mine	4/51	2/63	Yes
Askam Coal Co.	Coal Mining	Miner Under Mine	3/31/63	9/15/66	Yes
Glen Nan Coal	Coal Mining	Miner Under Mine	10/16/66	6/67	Yes
Blue Coal Corp.	Coal Mining	Miner Under Mine	7/67	5/15/68	Yes
John B. Corgan Coal Co.	Strip Mining	Coal Drilling	1968	~~1975~~ 1974	Yes
North East Energy	Strip Mining	Coal Drilling	[illegible] ~~1976~~	1980	Yes
~~North East Energy~~ [illegible]	Strip Mining	Coal Drilling	1980	1983	Yes

Last empl. [illegible]

Mr. Corgan has me doing lighter work, as I am unable to carry on heavy duties due to being in the Hospital.

JSB | James S. Butcofski M.D.

149 DANA STREET • WILKES-BARRE, PA 18702 • 717-826-6443

July 25, 1985

RE: ZIGGA, Peter
S.S. #169-145-425

ALJ Docket No [illegible]

To Whom It May Concern:

I have been seeing and treating Mr. Zinga since 3-24-83. At that time, he had a complete physical examination. My examination revealed that the patient is suffering from chronic obstructive pulmonary disease with emphysema. Since that time, the patient has had numerous studies done, which substantiate the fact that Mr. Zinga does indeed have chronic obstructive pulmonary disease and pulmonary emphysema, and his condition has worsened during this period. He was hospitalized at KPW Hospital on 4-20-83, for severe acute bronchiolitis, superimposed upon his emphysema, and he has been seen and treated here in my office on several occasions for upper respiratory tract infections, secondary to the same. There is obvious x-ray evidence, which can be obtained from his heating chart, which shows that he has chronic lung disease with chronic obstructive pulmonary changes associated with the same.

In addition to the above, the patient also has evidence on pulmonary function testing, with an FEV of 1, with his actual FEV at one liter being 2.79, the actual percentage of predicted, a value secondary to the same, is 93.3. This was interpreted by Dr. Yarmal, who agreed that the patient did have obstructive pulmonary disease and emphysema, and he felt that we should continue to consider this patient and treat him with medication.

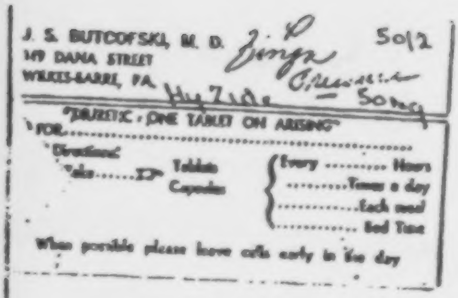
During the interim, the patient has done quite well. He continues to take bronchodilatory medication, plus respiratory exercises at home, in order to assist and help him react more favorably with respect to everyday life-giving situations.

Therefore, it is my opinion that this patient is totally disabled, secondary to chronic obstructive pulmonary disease and pulmonary emphysema, and this complication of emphysema, I feel, sufficiently causes this patient to have enough problems related to his primary illness to stop him from working for any type of gainful reserve. May I remain,

Sincerely yours,

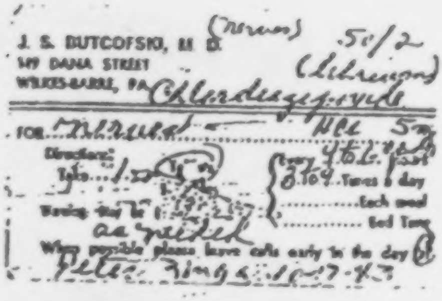
James S. Butcofski, M.D.

JSB/TA26

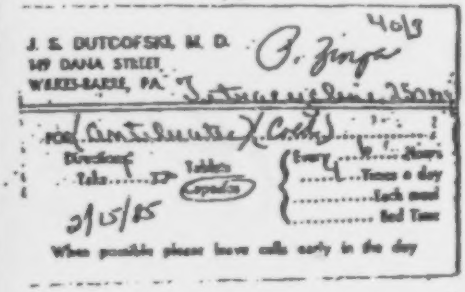


J. S. BUTCOFSKI, M. D. P. Zinga 50/2
149 DANA STREET
WILKES-BARRE, PA. Hy Zide [illegible] — 50mg

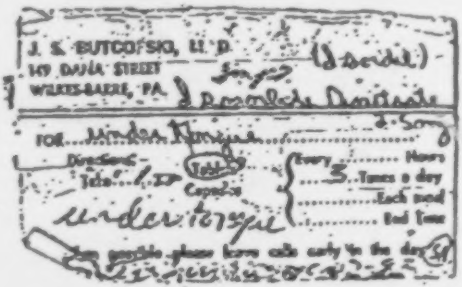
"DIURETIC - ONE TABLET ON ARISING"
FOR.................
Directions:
Take.......Tablets / Capsules
Every .... Hours
..........Times a day
..........Each meal
.... Bed Time
When possible please leave calls early in the day



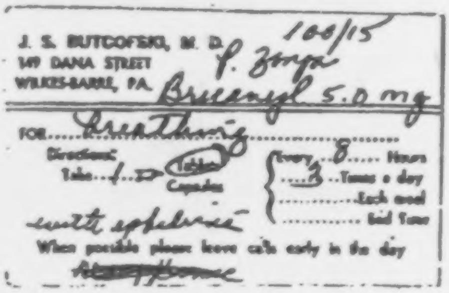
J. S. BUTCOFSKI, M. D. (Nerves) 50/2
149 DANA STREET (Librium)
WILKES-BARRE, PA. Chlordiazepoxide
FOR Nerves — HCl 5mg
Directions:
Take 1
Every 4 to 6 hrs
3 to 4 Times a day
..........Each meal
.... Bed Time
Warning: May be [illegible]
as needed
When possible please leave calls early in the day
Peter Zinga 10-7-83



J. S. BUTCOFSKI, M. D. P. Zinga 40/3
149 DANA STREET
WILKES-BARRE, PA. Tetracycline 250mg
FOR (Antibiotic X Colds)
Directions:
Take.......Tablets / [✓ Capsules]
Every 6 Hours
4 Times a day
..........Each meal
.... Bed Time
2/15/85
When possible please leave calls early in the day



J. S. BUTCOFSKI, M. D. (Isordil)
149 DANA STREET Zinga
WILKES-BARRE, PA. Isosorbide Dinitrate
5mg
FOR Under Tongue
Directions:
Take 1 [✓ Tablets] / Capsules
Every .... Hours
3 Times a day
..........Each meal
.... Bed Time
under tongue
When possible please leave calls early in the day
[illegible]



J. S. BUTCOFSKI, M. D. 100/15
149 DANA STREET P. Zinga
WILKES-BARRE, PA. Bricanyl 5.0 mg
FOR Breathing
Directions:
Take 1 [✓ Tablets] / Capsules
Every 8 Hours
3 Times a day
..........Each meal
.... Bed Time
with [illegible]
When possible please leave calls early in the day
~~[illegible]~~

Dr. James Butcofski had ordered me to keep Peter at home at all times.

Peter is also taking Bronkosol 1cc
0.3CC in 3CC Normal Saline
Solution 3 times daily in the Pulmo-aide machine.

(6)

PATIENT CARE CENTER

PC ☐ PCM ☑ PCP ☐
515-517 MARKET STREET, KINGSTON, PA 18704
PHONE 717-283-0691

DATE 2 21 19 85

SOLD TO Peter Zinga
ADDRESS Bx. 167B RD. #1
Shickshinny

PHONE # P.O #

SOLD BY	CASH	COD	CHARGE ON ACCT	MDSE RET'D	PAID OUT	ORDERED BY
			✓			

	QUANTITY	DESCRIPTION	PRICE	AMOUNT
1				
2	1EA.	Pulmo Aide		
3		Therapy Unit	- purchase	
4				
5		w/Rx.		
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				

SUB-TOTAL	
20% CO-INS. OWED	
TAX	
TOTAL	

No cash refunds, credit slip provided for resaleable items returned in seven days in saleable condition. Sales slip required. Positively no returns provided on special orders or charged merchandise.

RECEIVED BY MRS.

All merchandise for return must be in saleable condition.

PATIENT CARE CENTER

PC ☐ PCM ☑ PCP ☐
515-517 MARKET STREET, KINGSTON, PA 18704
PHONE 717-283-0691

DATE 7/6/1985

SOLD TO Peter Zingler
ADDRESS PO Box 167B RD 1
Shickshinny Telephone
PHONE # 18655 P.O. # # 256-7502

SOLD BY	CASH	C O D	CHARGE ON ACCT	MDSE RET'D	PAID OUT	ORDERED BY
Lori						

	QUANTITY	DESCRIPTION	PRICE	AMOUNT
1		O_2 Setup		
2				
3	1ea	24 cu-ft Oxygen Cyl		
4		W/stand		
5	1ea	Regulator Rental		
6		w/ humidifier bottle		
7		w/ nasal cannula		
8				
9				
10		#26707585		
11				
12		2LPM		
13				
14	1ea	Returned Nebulizer		
15				

SUB TOTAL
20% CO INS. OWED
TAX
TOTAL

No cash refunds, credit slip provided for resaleable items returned in seven days in saleable condition. Sales slip required. Positively no returns provided on special orders or charged merchandise.

RECEIVED BY Peter Zingler

All merchandise for return must be in saleable condition.

Mr. **Murphy**. Mrs. Scrippets, you may proceed. We understand that you are the widow of a coal miner, is that correct?

Mrs. **Scrippets**. Yes, sir.

Mr. **Murphy**. We have your prepared statement if you would just like to submit it for the record, or if you would like to go ahead and read it, whichever you prefer.

Mrs. **Scrippets**. I think I'd like to submit it for the record.

Mr. **Murphy**. Fine, we have it for the record.

[The prepared statement of Anna Scrippets follows:]

PREPARED STATEMENT OF ANNA SCRIPPETS, WILKES-BARRE, PA

Mr. Chairman. My name is Anna Scrippets and my husband's name was Felix. Felix and I were married for forty-two years, until his death in 1969. He worked as a coal miner in the Wilkes-Barre area for seventeen years.

Even while my husband worked in the mines he had trouble breathing and he was always coughing. He suffered for many years, after he worked in the mines, until his death. The condition of his lungs after he worked in the mines affected his ability to hold other employment.

I applied for widow's black lung benefits in Passaic, New Jersey, in 1972. But when I went back to transfer the records to Wilkes-Barre, they told me they had no record of my claim, so I filed a new claim in Wilkes-Barre in 1974 and since then have had a lot of correspondence back and forth to Washington, New Jersey and Wilkes-Barre. The same answer was always received, you will be notified, your hearing will be coming up soon. Although my hearing date was finally set for July 16, 1985, I was advised twice before that my hearing would be scheduled "in the next available itinerary".

I have waited too long for something that is due me. In New Jersey I was holding two jobs to make ends meet and put my daughter through college. I really didn't know that there was a time limit for filing claims.

I must say that all the Congressmen tried to help and maybe this time through Congressman Kanjorski and others, I pray that I will receive black lung benefits.

Mr. MURPHY. How long did your husband work in the coal mine?

Mrs. SCRIPPETS. Seventeen years.

Mr. MURPHY. Before he died, did he file an application for black lung benefits?

Mrs. SCRIPPETS. Not that I know of, no.

Mr. MURPHY. Have you applied for widows benefits?

Mrs. SCRIPPETS. I applied in 1974 in Wilkes-Barre, and in 1971 in New Jersey.

Mr. MURPHY. Have those claims been determined? Have you had any results from those claims?

Mrs. SCRIPPETS. I had a hearing in July 16 of this year in Scranton.

Mr. MURPHY. Have you had any word since that July 16 hearing?

Mrs. SCRIPPETS. No, sir.

Mr. MURPHY. Is that the first and only hearing you had after you filed your claim in 1974?

Mrs. SCRIPPETS. Yes, sir.

Mr. MURPHY. Did you receive any interim benefits? Did you get benefits?

Mrs. SCRIPPETS. I didn't get any benefits at all.

Mr. MURPHY. You never got any benefits?

Mrs. SCRIPPETS. No, sir.

Mr. MURPHY. And never had anything except a hearing until July of this year?

Mrs. SCRIPPETS. That's right. I received a lot of information and that I would have a hearing before that, many times, but I never had one.

Mr. MURPHY. Mr. Gaydos, do you have any questions?

Mr. GAYDOS. Do you have an attorney?

Mrs. SCRIPPETS. Attorney Kasper.

Mr. GAYDOS. Has he been advising you throughout the years?

Mrs. SCRIPPETS. Yes, sir, and many times I was supposed to have a hearing and it never came through.

Mr. GAYDOS. How long did your husband work in the mines?

Mrs. SCRIPPETS. Seventeen years.

Mr. GAYDOS. Did he die in New Jersey or here in Pennsylvania?

Mrs. SCRIPPETS. In Pennsylvania.

Mr. MURPHY. Mr. Kanjorski, do you have any questions?

Mr. KANJORSKI. Mrs. Scrippets, am I to understand that July 16 of this year you did have your hearing?

Mrs. SCRIPPETS. Yes, I did.

Mr. KANJORSKI. But you haven't been notified as to the result of that hearing?

Mrs. SCRIPPETS. Nothing.

Mr. KANJORSKI. Do you know whether or not there is any additional testimony or any additional things that have to be done, or did that complete that record?

Mrs. SCRIPPETS. No; I think that concluded it.

Mr. KANJORSKI. As I see it you've been waiting then for approximately 13 years from the inception of your petition?

Mrs. SCRIPPETS. Yes.

Mr. KANJORSKI. Would it be too presumptuous of me to ask how old you are?

Mrs. SCRIPPETS. Eighty-three.

Mr. **Kanjorski**. Well, all I can say is I've read your testimony and I have other questions, but I'd just like to apologize for the poor manner in which the administration of this act has occurred in your particular case. But I call your attention that my colleagues and I are here today and we're going to try and do something about it and we hope we can cure problems just like yours because there are so many of them in the country.

Thank you very much for coming.

Mrs. **Scrippets**. I think with your help I got this hearing.

Mr. **Kanjorski**. Thank you.

Mr. **Murphy**. Thank you very much, Mrs. Scrippets. We also have the prepared testimony of Mr. Zinga which I will submit for the record without objection.

The other two witnesses we had scheduled were unable to come due to their illnesses. I ask that their statements be submitted into the record.

The next witness we have is the United Mine Workers, district 25 president, Mr. Michael Semko.

[The prepared statements of Alexander Heromin and Vincent Prushinski follow:]

PREPARED STATEMENT OF ALEXANDER HEROMIN, MT. CARMEL, PA

Mr. Chairman. My latest claim for black lung benefits was filed on May 11, 1981. I had filed other claims before this and sent in a lot of x-rays and affidavits showing that I had worked in the mines before that, but the last claim I filed was in May of 1981. By July of 1982, my lawyer had sent in a lot of medical evidence, including some reports by my doctor, x-rays, breathing tests and other things which showed that I had 27 years in the anthracite mines in Pennsylvania. The Department of Labor, although they agreed that I had black lung and eventually they agreed that I had 26 years in the mines after a conference, still said I wasn't entitled to benefits because I was only "half a point away", whatever that means.

My lawyer at the time, appealed the case and asked for a hearing and in July of 1982 the Department of Labor said that they were sending it to Washington to set up a hearing. From time to time my lawyer or my doctor would send them more information about my condition. In the meantime, my lawyer got sick and became disabled himself and I had to get another attorney in November of 1983. He sent them more information about how a B reader said I had black lung, and another report from my doctor explaining why I was disabled.

We didn't hear anything about scheduling a hearing until April of 1985, which was four years after I applied, and at least three years after we appealed and asked for a hearing. We didn't actually get a hearing date until June of 1985. The hearing was finally held on August 23, 1985. In the meantime, my lawyer has died, and my doctor got sick and died and I sometimes think it is a miracle I didn't get sick and die. My breathing is even worse now that it was then and it's been bad for many years.

Even the Department of Labor agrees that I have 26 years in the mines and I have black lung. It took three years to get a hearing after I requested one. I don't want to sound impatient, many of the people I worked with in the mines are old or dead, my lawyer is dead and my doctor is dead. I am not healthy, or I wouldn't be applying for black lung, and waiting around for a hearing has not been easy; especially as I see the people I need to prove my case dying.

I guess I should just count myself lucky that I finally had my hearing, because I have heard of other people who have waited even longer. But I just don't understand why it has to take this long.

PREPARED STATEMENT OF VINCENT PRUSHINSKI, NANTICOKE, PA

Mr. Chairman. In 1973, through the advice of my doctor, I filed for black lung. I was denied by mail without even having a hearing. Thereafter, in 1975 or 1976, I filed with the Labor Board this same claim. I then had a hearing scheduled once and it was cancelled because the Law Judge never showed up. A decision was handed down without my presence and again was denied. So, I again appealed and once again went for tests to the General Hospital in Wilkes-Barre, PA. They refused to tell me the outcome of my tests, so once again I'm waiting for another hearing.

In December, 1982, I took very sick and I was admitted into the Nanticoke Hospital. They then found a tumor on my lung. They transfered me to the Mercy Hospital in Wilkes-Barre where two surgeons performed major surgery on me. That was January 6, 1983. [redacted].

Here are some quotes from employees that handled my case in the Department of Labor, in Washington, D.C. :

> December 4, 1980, (Mr. Mocksley): "You were found disabled from blood gas test taken September 4, 1980 at the General Hospital, Wilkes-Barre, PA."

> December 10, 1980, (Mrs. Helen Korbin): "You meet the qualifications for disability."

Upon closing, I was told by the surgeons who performed my surgery that I'm loaded with anthrasilicosis. How much more proof do they want?

Mr. Semko, you may take the witness chair and proceed.

STATEMENT OF MICHAEL SEMKO, PRESIDENT, DISTRICT 25, UNITED MINE WORKERS OF AMERICA

Mr. SEMKO. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am Michael Semko, international executive board member and acting president of district 25, United Mine Workers of America. On behalf of the members of district 25 I want to thank you for seeking the views of the anthracite miners on this important issue.

As you know, Mr. Chairman, the hard coal region of Pennsylvania once occupied an important position in the Nation's industrial economy. At the height of World War II, nearly 80,000 miners produced over 60 million tons of anthracite per year. Significant amounts of anthracite were consumed by the railroads, electric utilities, industrial plants, U.S. Armed Forces, and foreign buyers. The bulk of production, however, was used for space heating in residential and commercial facilities in New England and the Middle Atlantic States.

Anthracite markets began to decline after World War II as oil and natural gas became the fuel of choice for space heating. As markets declined, production and employment also fell. Today the anthracite industry employs about 2,500 people and produces about 4 million tons per year.

The industry has declined sharply in recent decades but we still have with us a legacy from the past. That legacy is the severe human suffering caused by diseases of the lungs commonly known as black lung. Black lung is a generic legal term for several lung diseases that are caused by breathing coal mine dust. The diseases also have such names as miners' asthma, silicosis, and emphysema. Despite the variety of names, these diseases are all caused by breathing coal mine dust and result in the same symptoms—coughing, tightness of the chest, shortness of breath and inability to perform everyday activities such as walking up steps.

It is recognized that anthracite miners are particularly prone to these diseases because of the unique dust characteristics of anthracite. And because so many people once worked in the anthracite industry, we have thousands of former miners who are afflicted with this dreadful disease.

Congress adopted a program to compensate victims of black lung nearly two decades ago. The theory was that since we could not reverse the course of the disease, we should provide medical care and cash benefits, so that the victims and their dependents could live out their lives with a modest degree of economic security.

Today we know that the program has become extremely complex and is proving to be a bureaucratic nightmare for the black lung victims. Never-ending delays are the order of the day in far too many cases. A black lung victim faces years of delay from the filing of a claim to the final rendering of a decision. The situation has become extremely unfair for the people whose health has been destroyed by their employment.

Congress created the Benefits Review Board in 1972 to provide prompt and efficient due process of law for all parties involved in claims for benefits arising out of the Longshoremen's and Harbor Workers' Compensation Act and the Federal Coal Mine Health and Safety Act. The Board, consisting of three members appointed by the Secretary of Labor, is supposed to perform the same judicial appeals review function that the U.S. district courts exercised prior to 1972. It is the final step in the administrative review process, hearing all appeals from the Department of Labor's Office of Administrative Law Judges.

The severe backlog of cases at both the ALJ level and at the Benefits Review Board is cause for serious concern. The Board had a backlog of 2,239 black lung cases as of September 30, 1981. Within 3 years the backlog of pending cases had more than doubled: as of September 30, 1984 the Review Board reported a pending docket of 5,234 cases. Furthermore, no significant improvement can be expected in the near future. The Office of Administrative Law Judges currently has a pending backlog in excess of 20,000 cases. It can be expected that many of these cases eventually will end up on the Review Board's inventory of cases.

The inability of the review process to function efficiently has caused a great deal of consternation and uncertainty among black lung claimants. In many cases, a decision by the Deputy Commissioner in favor of a claimant automatically is appealed by the coal companies. The review process at the ALJ level currently can take as long as 3 to 4 years. A further appeal to the Board can extend the process 2 to 3 more years. In the meantime, the black lung victim is left in limbo, not knowing if his benefits will continue or whether he will be told to repay the money he received in good faith.

It is extremely unfair to keep these victims waiting for years, ill at ease and fearful of the outcome, until a final decision is reached. It is also very unfair to seek repayment from these senior citizens in cases in which the initial determination of an award is overturned. Elderly former coal miners are not among the privileged in our society. Almost without exception, repayment of an award, usually years after it was received, is a severe hardship and a threat to their economic security in their declining years. It serves no national purpose to put these unfortunate people through the wringer. The end of benefit payments is punishment enough.

There is an obvious need to increase the staffing levels of the Benefits Review Board and the Office of Administrative Law Judges. Congress passed legislation in late 1984 to increase the size of the Board from three to five members and authorized the Secretary to designate up to four ALJ's as temporary members of the Board. This undoubtedly would help relieve the tremendous bottleneck, but to date, the Department of Labor has not taken the necessary action to implement the new congressional directives.

Mr. Chairman, you and your colleagues can correct a longstanding, nagging, and unnecessary wrong by insisting that sufficient funding be appropriated to clear up the backlog at both the ALJ and BRB levels. It would take relatively little money for a short period of time to make the system work for the people, not against them. The number of black lung claims originating today is much lower than it once was. If we clear up the backlog now, we can return to current personnel levels quickly, and with no fear of creating new delays in the future.

On a personal note, I can say that I had a father that worked 45 years underground in the mines and suffered fiercely with black lung, and I had two brothers that worked there and I have been in the industry 39 years myself.

I have also witnessed, and I can agree with what Congressman Kanjorski had to say and he certainly was most fair to our people in handling silicosis in his role as a referee at the State level. I have seen first hand the anxiety, what the claimants go through in waiting to hear on their cases, both at the State and the Federal level.

We're here today for the Federal level, and we're asking for help from you people so that we can reduce this backlog and put our people at ease.

Thank you kindly for coming to the anthracite region to try to help our people. Thank you once again.

Mr. MURPHY. Thank you Mr. Semko. We appreciate your testimony, we appreciate the efforts of the officials of the United Mine Workers on the district and international level for helping us bring this to the attention of the National Department of Labor.

The next panel of witnesses are three attorneys from this area who have been very active recently in handling the problems of black lung claimants. Attorney Helen Koschoff, Attorney Michael Cefalo, and a former congressional staffer and now Attorney Thomas Makowski. Will you please take the witness table, counselors, and we'll commence with the testimony of Ms. Koschoff.

STATEMENT OF HELEN KOSCHOFF, ESQ., CENTRALIA, PA

Ms. KOSCHOFF. Good morning. I would like to join with the speakers before me in welcoming you to northeast Pennsylvania. I know that you all have very busy schedules, that you had to take time from to come here and be with us, and I believe your presence here today is a recognition of the sacrifice and contribution that the miners have made to the anthracite coal industry in northeast Pennsylvania.

I especially would like to thank Congressman Kanjorski who has made it possible for us and for the members of the public to be here and participate in these hearings today.

By way of background, I am in private practice in Centralia, PA, a coal mining town that many of you have probably heard of. I come from a long family of coal miners. My grandfather in his eighties had to use oxygen to walk from room to room because he had spent his entire occupational history in the anthracite coal industry working in underground mines.

I believe if we are to look at the program and the backlog that exists today we have to start with the first tier, and that is why there is currently an approval rate of 4 percent? That means 96 out of 100 miners and widows that file claims are waiting for decisions to be made. Those 96 that are initially denied, in most cases, do not have any income. They are barely able to get by, and whether they get approved benefits initially or further down the road can make a difference in how they are able to live.

In my own caseload of Federal black lung clients I can say that there is a very high percentage of my clients who are in their late sixties, in their seventies, and even in their eighties. The average filing date on my claims range back to 1973. Most have been filed around 1978 or 1979. That means 7 to 12 years those people have been waiting for their cases to be resolved.

As I said, I have to wonder, and I certainly hope that you will wonder enough to look into why 4 out of 100 cases are initially being approved. If the intent and the purpose of the Federal black lung legislation is consistent today and if that same commitment and concern is evident today, then there is something drastically wrong in that approval rate.

As far as my own thoughts on how the system can be improved, I certainly agree wholeheartedly with Congressman Kanjorski. I believe it's a very novel idea that hasn't been brought up before, but it would certainly be worthwhile to consider, removing the administrative law judges from the program so that they can be the independent review body that they should be.

Also, at the initial level it seems that not only should the numbers be looked at but how those cases are decided. It's inconceivable to me that the Department of Labor on the initial level would set up a series of tests at their own facility for claimants, have a claimant go to that examination and have every single piece of evidence be positive and supportive. Commonsense would dictate at that point the claim would be approved.

Instead, what invariably happens is that those test results and x rays are sent to a select number of consultants who invalidate every qualifying test. It is not unusual for me to have my clients subjected to two and three series of tests all of which qualify them for benefits, and none of which are ever accepted. They go on to the hearing level and they should be approved initially. That I see as a very big problem.

Another thing that happens is at one point there were informal conferences that occurred in the local offices. My possible suggestion would be to rejuvenate those informal conferences and maybe bring in an experienced person from the program who would meet face to face with the attorney and the client and tell them what the problems are in the case. What is it that needs to be proved in order for this person to start getting their benefits? Those informal conferences which once took place have now been eliminated. It would also seem, since my own experience dictates that many cases that leave the initial office should never have been denied to begin with, that there should be some step in the process that would allow an opportunity for review and possible remand for approval.

When the cases leave the local offices they go to the Office of Administrative Law Judges. They sit there for years and years, and some of those cases, as I said, never should have been there. If there was a qualified person reviewing them when they came to the office, I believe many of those cases could be remanded back for the appropriate decision.

As far as I'm concerned, I believe we have to look at the philosophy of why these decisions are being made. I know for a fact that many of my clients won't live to see their benefits come through and that is a shame.

I thank you for allowing me to address you today about this. I have my written statement that I would ask be submitted into the record.

Mr. **Murphy**. Without objection we will admit your entire testimony into the record.

[The prepared statement of Helen Koschoff, Esq., follows:]

PREPARED STATEMENT OF HELEN KOSCHOFF, ESQ.

Dear Mr. Chairman and Members of the Panel, It is a pleasure and an honor to have members of your Committee here in Wilkes-Barre today. Your willingness to travel to Northeastern Pennsylvania and to listen to the comments and concerns of those of us who practice in the area of federal black lung law is certainly commendable. I wish to personally thank you for the commitment on your part that is evident by your presence here today and most assuredly, the work of our own Congressman Paul Kanjorski in providing this opportunity for us to express our thoughts on this vital matter.

My name is Helen Koschoff. I am an attorney in private practice in Centralia, Pennsylvania. Since I am a native of the coal mining region and a coal mining town, I have had ample opportunity to meet and know those men who have worked in the anthracite coal industry most, if not all, of their lives as well as the widows of those miners now deceased. Consequently, in the course of my law practice, I have chosen to devote a substantial portion of that practice to representing those miners and the widows of those deceased miners in their pursuit of federal black lung benefits.

I must admit that, along with the sense of pride I feel in being asked to address this body, there is a certain reluctance in knowing that the matter before this Committee is one of critical concern and I would be remiss if I did not state at the outset that it is not my purpose to condemn the current Program. Rather, my purpose in being here today is to offer what I intend to be positive, constructive comments aimed at enhancing the current Federal Black Lung Program and, most importantly, allowing it to most fully and fairly serve this country's coal miners and their families.

The issue before us today is one of vital concern to those who have filed federal black lung claims and those who have yet to file. This concern involves the backlog of claims awaiting a hearing before the Office of Administrative Law Judges in Washington and the cases pending review by the Benefits Review Board.

In order to properly address that issue, it is important to decide the ultimate purpose to be achieved. If, for example, it is simply to remove the backlog, then the solution becomes a relatively simple one. Hire more Judges to hear the cases; transfer more Judges in from other programs to supplement those hearing cases; and employ more supportive staff to type the decisions. The end result will be to get rid of the backlog. However, with a national approval rate for federal black lung claims currently reported to be extremely low, especially under the 1981 Amendments, the realistic result will be to deny those men who have worked at perhaps one of the most backbreaking, strenuous, dangerous and unhealthy occupations, from receiving benefits. They, however, can always refile a claim. It is the widows who would fare the worse since, once they exhaust their appeal rights, they are precluded from ever again pursuing a claim.

This purported "solution", i.e., by throwing money at the problem, can have a debastating impact on pending claim and not necessarily result in fair and just resolutions of the pending backlog. Nor would it necessarily remove those claims completely from the system.

If, on the other hand, the purpose of meeting here today is to discuss solutions to the case backlog problem while simultaneously balancing the efficient operation of the Program and attempting to achieve the end result of fairness to the miners and widows awaiting those hearings and their ultimate outcomes, then I believe a multi-faceted approach to this problem is warranted. I am here today because it is my hope and my belief that your concern and commitment to addressing this problem goes beyond the mere numbers of cases pending, but rather to the heart of the end result which is to be achieved. I firmly believe that a fair and complete review of each miner's and widow's claim is essential since, in *many cases, it is the only source of income for the person* seeking the benefit.

While seeking a fair and expeditious determination to currently pending cases is a worthwhile goal, the solution is not quite so simple.

It may warrant a moving away from the current attitude which appears to equate an expeditious determination of a claim with making that claim a denial. It sometimes seems that there is a prevailing belief that the best way to move a case through the system, or, if a person is unrepresented, to have the case administratively closed, is a quick denial at all costs. And there may be some truth to this philosophy. In my practice, I have talked with a substantial number of miners who, having initially had their claim denied, gave up on any further pursuit of it, and now, years later, are refiling under what we can all agree are the most difficult entitlement standards to date. Perhaps many of those claimants that I do not see also refile, are again initially denied, and then lose hope and just drop their claims completely. This is one way to dminish the current number of pending cases. This procedure, if it truly exists, is not easy to define or eliminate.

While it is true that the 1981 Amendments are unusually stringent, it is also highly possible that in many instances the regulations are not being given their proper consideration. For example, my experience indicates that, although the law does allow for an approval of a claim based solely on a reasoned medical opinion, I have never seen such a claim approved. Although the law allows for an approval in certain instances, even in light of a negative x-ray reading, I have never seen such a case approved. What I have witnessed however, time and time again, is a miner who has had medical testing done at the facility/doctor authorized by the Department of Labor as their provider, and whose tests and x-rays have been totally supportive of his respiratory condition, and, in these instances, rather than approve a claim (and remove it from the backlog), the Department will invariably send those tests to a selected doctor who will invalidate any qualifying medical tests, *even* those done at the Department's request and at a facility chosen by the Department. Once must ask, if the Department lists someone as an authorized provider and is willing to pay the cost of testing at that facility and has complete authority to send the claimant there, why then, when the tests are supportive, are they then invalidated? My experience, I might add, has been that nonsupportive tests from those same providers are always "valid". This end result, again basically resulting from a denial-prone philosophy, ends up in additional costs to the more-than-likely unemployed miner/widow who must now be personally responsible financially to further pursue the case and it is more costly to the Department who, further down the road will again require additional testing, and will require persons to defend the claim at a hearing, and is more costly in terms of case backlog to all parties involved. An acceptance of positive findings from a Department of Labor Provider would allow those easily-identifiable initial claims to proceed to their rightful outcome while allowing the more legally arguable and complex claims to be appealed, should the claimant so desire. The issues would be more clearly defined and the appealed cases reduced.

Another possible way to further alleviate the need to appeal some of these obvious approvals is to have senior claims examiners in the Program with authority to issue decisions without having those claims subject to further review, usually always through the same, single, individual who has his/her own fixed perception of federal black lung law. I know in my previous position as a Claims Adjudicator for the Social Security Disability Program, there was in-place supervisory review and quality control review but there was also authority for claims adjudicators to make decisions which they felt were fair without having to account for the fact that their approval/denial rate was being monitored rather than the quality of work performed.

In conjunction with independent review of the claims, it might be suggested that following an initial denial of a claim, any reconsideration review requested by the claimant be undertaken by a claims examiner who did not participate in the initial decision. Further, informal conferences which were once held to attempt to resolve issues that might be appropriately addressed and decided while the claim is before the Deputy Commissioner, seem to have gone by the wayside. Rescheduling of informal conferences might be a way to reduce the backlog since it would be the first opportunity for the claimant and his/her attorney to sit down, face-to-face with a senior claims examiner in an attempt to understand and provide any additional information needed to clear an existing deficiency in the claim. I am reminded of a claimant, unrepresented, who was initially denied solely because his years of coal mine employment were not fully documented. Because he was never told the eyar which were in question, he attempted to pursue his claim by resubmitting evidence for years of coal mine employment already documented in the file. His claim was again denied and he no longer pursued it, although the medical evidence clearly and unequivocally established a totally disabling condition due to his anthracosilicosis.

It might also be advantageous to establish another line of review once the claim is forwarded to the Office of Administrative Law Judges and before it becomes part of the staggering statistical backlog. The purpose of this review would be to obtain any additional medical testing which the Department intends to secure, thereby again, if favorable evidence exists in the file, the case could be and should be appropriately remanded for a proper determination. Instead, copies of cases sent to the Office of Administrative Law Judges often languish in the Office of the Regional Solicitor until, in many cases, a hearing is scheduled, two years doen the road, and then the Department decides to attempt to secure last-minute medical evidence to rebut the miner's claim in which he has meanwhile submitted, at his own expense, supportive medical documentation. This again results in cases being delayed in order for additional evidence to be sucured which could have been obtained some time ago.

Further, the regulations need to be strictly adhered to by all parties. A claimant, responsible for developing their claim, is required to provide evidence to all parties with due diligence. However, it appears that insurance carriers for responsible operators are not required to either diligently define the issues they are contesting in the claim nor are they required to undertake medical development with due diligence. Instead, many cases that could be resolved before the Deputy Commissioner again find their way into the backlog before the Office of Administrative Law Judges due to the apparent laxity allowed the defense of these claims by insurance carriers. Finally, if proper development, independent review, and timely adherence to the regulations coexist, then the claims that proceed to the hearing level will be diminished in number and, most importantly, many of those that should have been found entitled to benefits will not have to be waiting years for a decision. Many of those same miners, I might add, will no longer be alive when a hearing date is finally set.

In this way, the caseload before the Judges could be more reasonable in number and substance. Then, the final consideration under this approach would be to determine whether indeed more Judges and supportive staff are needed to process the claims pending before the Office of Administrative Law Judges and the Benefits Review Board. And if more Judges are to be brought into the Program, then I would offer one more comment. There is nothing more frustrating than to have the fate of your client's case rest upon the decision of someone unfamiliar with the Program.

I have had occasion to be required to file legal briefs to explain the meaning of "total disability" under the federal black lung law. I have had cases, heard by Judges from outside the black lung program, languish for almost a year now awaiting a decision after being heard. I firmly believe that if more Judges are to be utilized for federal black lung hearings, they should be either Judges hired to deal solely with federal black lung law or, in the alternative, if it is just a temporary action needed to alleviate the backlog, perhaps bringing retired judges familiar with the black lung law back to work temporarily would be a worthwhile consideration.

If the system is not improved to deal adequately with the issue before us, then, speaking from a claimant's perspective, the only possible consequence will be for miners to continue to file claims, year after year, and time and time again, and their widows after them, until the system comes to a grinding halt.

Thank you.

STATEMENT OF MICHAEL J. CEFALO, ESQ., WEST PITTSTON, PA

Mr. CEFALO. Chairman Murphy, Mr. Gaydos, Mr. Kanjorski. Mr. Gaydos and Mr. Kanjorski I am familiar with. I have known Mr. Gaydos since I was an employee of the House of Representatives, and I've known Mr. Kanjorski both as a lawyer in our community, as an administrative law judge with the Pennsylvania Department of Workers' Compensation, and as a Congressman.

I'm from West Pittston, PA, and on behalf of my law firm and my staff I extend my thanks and appreciation for the opportunity to appear before you this morning and make some suggestions concerning the Black Lung Program and related matters. After I state some of the facts in connection with the subject it would indeed be a privilege to make what I believe to be constructive suggestions to the Congress of the United States if we're to effectuate a more competent implementation of the Black Lung Benefit Program and to shortcut the decisionmaking process.

In 1969 I was there when Congress enacted the Federal Coal Mine Health and Safety Act of 1969. I, like the other individuals that have testified before me, come from a long generation of coal miners. Both of my grandfathers were coal miners, all of my uncles were coal miners, my father-in-law was a coal miner.

It was one of the most humane parcels of legislation in the Nation's history. There was never another act like it. It was led to final passage by men such as John Dent who was discussed before, Mr. Gaydos, and Daniel J. Flood, our Congressman from the 11th Congressional District for many years. The seat is now held by Mr. Kanjorski. And despite the strenuous objections from many of the citizenry of this country including some members of the legislative body, thousands of black-lung victims were given added room to breathe by their Federal benefits. It lengthened their lives. It provided them with some of life's necessities, without which their lives would have been cut short. But there are still people who are entitled to the benefits and who are denied. There are miners who still suffer from the disease, and they're denied.

An investigation some time ago by the Bureau of Mines, the U.S. Public Health Service, and the United Mine Workers of America, revealed that in the anthracite industry one in every four men was affected by silicosis or black lung. It's a progressive ailment from which men die, and from which medical men have evolved very little treatment. One in every four die that way because they worked in an industry which provided the public of this great Nation with a necessary source of fuel.

Black lung or pneumoconiosis makes its victims die on their feet. They gradually get slower and slower. They go down in the mines, they cough, some cough more than others, some get it in higher degrees than others. They go slower and slower, and they finally die. When they come and they ask for the benefits which are provided by legislation from the U.S. Congress, they see great publishers in this country indicate that we shouldn't provide the benefits any longer, that it was a mistake to enact the program. We have some legislators who are enhanced by that. There are a lot of people who are rich in power and they echo those sentiments. The pressure on Congressmen to line up against this legislation is great, and the coal miners only have the representatives such as the lawyers and the Members of Congress who understand from their constituency what it's like.

I know. I saw my grandfather who was a coal miner for 50 years die in the care of his neighbor, who he helped to be a medical doctor, who learned very little about the disease and could only ease his pain. I was there when my father-in-law took his last breath. A coal miner from the time he was 8 years old.

Gentlemen, if the provisions of the act are to be administered as Congress intended, I recommend to you Mr. Chairman, and your committee, the following:

Close the time gap between the filing of a claimant's application and final decision. Each time there is a time provision in legislation such as in criminal law that both the Commonwealth of Pennsylvania in which you sit, and the Federal Government have, there is an imposition on the State or the Federal Government to provide the benefits if you deny them a decision within the prescribed time. I think you should correct the excessive delays in awarding and the actual payment of counsel fees, and assign additional administrative law judges. This has been spoken to before.

The time lapse between the filing of an original claim benefit application and the agency's acknowledgment of receipt of the application can run between 6 months and 1 year. Cases are transferred from one examiner to another, from one office to another without any notification to the claimant, and this results in another delay—sometimes months and sometimes years.

Medical information, marriage license, and other personal documents required make a case dormant for a long time after the information is submitted without any acknowledgment. While the claimant sits and thinks that all that is needed is a review of his claim so he can get his check. Claimants' letters of rejection are mailed after appeal periods have expired. There have been many cases with short notice necessitating the filing of new application and the loss of retroactive right.

With regard to counsel fees, it's common to wait 2 years from the original fee petition, after a favorable result, until actual payment. There is no justification for this. Lawyers, like other people, render a service. Doctors wouldn't tolerate having that kind of delay between the submission of their bill and a payment by anyone including the Government, nor should attorneys. This has caused a great number of lawyers in our community and communities across the United States to refuse to represent claimants in black-lung matters, knowing that if they're successful they may not be paid for a substantial period of time. It would be far more equitable to everyone if some constraint or regulation concerning the payments would be instituted, and also whether or not some constraints would be that a final decision in a black lung case must be made within a prescribed period of time.

With regard to the counsel fees, the delay in payment to attorneys have caused some lawyers to be tempted by the offer of successful claimants to pay their lawyer. The claimants feel that they rendered a valuable service and they should be paid, and often have paid them contrary to regulation and the letter of the law.

As to the third area of how improvement can be made in the black-lung benefits and the payment thereof, you need additional permanent administrative law judges. They should be appointed and required to serve in concentrated areas where black-lung petitions are filed and should be designated under the Department of Labor to hear a prescribed number of cases within a prescribed period of time.

You can eliminate the backlog if you transfer administrative law judges from the area and appoint new ones.

I believe the time has come to consider further steps which will better administer the black-lung benefit program and accelerate the process of the claimant's application. Many of my clients have died before there was a hearing. Many of my clients have died long before notification of a successful result. And a lot of my clients have died never knowing whether or not they would ever receive any of the benefits.

Mr. Chairman, thank you for coming to Wilkes-Barre, PA, to hear the people here speak on behalf of those who have labored before us, and to bring order, hopefully after these hearings, to a frustrating administration of a much needed, good and a humane law.

Thank you very much.

[The prepared statement of Michael J. Cefalo follows:]

PREPARED STATEMENT OF MICHAEL J. CEFALO

I AM ATTORNEY MICHAEL J. CEFALO OF WEST PITTSTON, PENNSYLVANIA.

ON BEHALF OF MYSELF, MY LAW FIRM AND STAFF, I EXTEND MY THANKS AND APPRECIATION FOR THE OPPORTUNITY TO APPEAR BEFORE YOUR DISTINGUISHED COMMITTEE TODAY TO MAKE A STATEMENT ON THE SUBJECT OF THE BLACK LUNG PROGRAM AND RELATED MATTERS.

AFTER I STATE CERTAIN FACTS IN CONNECTION WITH THE SUBJECT BEFORE YOU, I WOULD ESTEEM IT A PRIVILEGE TO BE ABLE TO MAKE WHAT I BELIEVE WOULD BE CONSTRUCTIVE SUGGESTIONS TO THE CONGRESS OF THE UNITED STATES, IF WE ARE TO EFFECTUATE A MORE COMPETENT IMPLEMENTATION OF BLACK LUNG CASES TO SHORT CUT THE DECISION-MAKING PROCESS.

IN 1969 THE CONGRESS ENACTED THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, ONE OF THE MOST HUMANE PARCELS OF FEDERAL LEGISLATION IN THE NATION'S HISTORY - COMMONLY KNOWN AS THE BLACK LUNG LAW WAS SPONSORED AND

LED TO FINAL PASSAGE BY THE HONORABLE DANIEL J. FLOOD OF THE 11TH CONGRESSIONAL DISTRICT OF PA, NOW HELD BY PAUL KANJORSKI. DESPITE STRENUOUS OBJECTIONS FROM MANY OF OUR CITIZENRY, INCLUDING SOME MEMBERS OF OUR LEGISLATIVE BODIES, THOUSANDS OF BLACK LUNG VICTIMS WERE GIVEN ADDED BREATHING ROOM AS THEIR FEDERAL BENEFITS LENGTHENED THEIR LIVES AND PROVIDED THEM WITH SOME OF LIFE'S NECESSITIES - WITHOUT WHICH THEIR LIVES WOULD HAVE BEEN CUT SHORT. THERE ARE STILL THOSE WHO WOULD DENY COAL MINERS, SUFFERING FROM BLACK LUNG, ANY FORM OF FEDERAL BENEFITS.

AN INVESTIGATION CONDUCTED SOME YEARS AGO BY THE BUREAU OF MINES, UNITED STATES PUBLIC HEALTH SERVICES, AND THE UNITED MINE WORKERS OF AMERICA, REVEALED THAT IN THE ANTHRACITE INDUSTRY, IN WHICH AREA YOU NOW SIT, ONE MAN IN EVERY FOUR WAS AFFLICTED WITH SILICOSIS, A PROGRESSIVE, MALIGNANT AILMENT FROM WHICH MEN DIE, AND FROM WHICH MEDICAL MEN EVOLVED VERY LITTLE TREATMENT; ONE IN EVERY FOUR MEN DIE THAT WAY, BECAUSE THEY WORKED IN AN INDUSTRY TO PUBLIC REQUIREMENTS.

BLACK LUNG OR PNEUMONICOSIS MAKES ITS VICTIMS DIE ON THEIR FEET, GRADUALLY THEY GET SLOWER AND SLOWER; THEY GO DOWN INTO THE MINE, THEY

COUGH - COUGH SOME MORE, AND THEY WALK A LITTLE SLOWER - AND SLOWER, AND THEY DIE. WHEN THEY ASK FOR SOMETHING, THEY HAVE THE SATISFACTION OF SEEING OUR GREAT PUBLISHERS COME OUT IN INDIGNANT EDITORIALS, LATER WE SEE THOSE EDITORIALS INTRODUCED IN CONGRESS BY CONGRESSMEN WHO KNOW NOT WHEREOF THEY SPEAK, BUT WHO THINK THEY ARE BUYING A FAVOR FROM SOMEBODY, WHO IS RICH IN POWER, BY ECHOING WHAT THEY SAY. THE PRESSURES ON THESE CONGRESSMEN LINE THEM UP TO VOTE AGAINST APPROPRIATIONS TO FUND BLACK LUNG BENEFITS FOR THESE SLOW DYING COAL MINERS. I KNOW I SAW MY GRANDFATHER, A COAL MINER FOR 50 YEARS, DIE IN THE CARE OF HIS NEIGHBOR, WHO HE HELPED TO MEDICAL SCHOOL. I WAS THERE AS MY FATHER-IN-LAW TOOK HIS LAST GASP, A COAL MINER FROM THE AGE OF 8.

IF THE PROVISIONS OF THE ACT ARE TO BE ADMINISTERED AS THE CONGRESS INTENDED, I RECOMMEND TO YOU, MR. CHAIRMAN, AND YOUR COMMITTEE, THE FOLLOWING:

1. CLOSE THE TIME-GAPS BETWEEN THE FILING OF A CLAIMANT'S APPLICATION AND FINAL DECISION.
2. CORRECT THE EXCESSIVE DELAYS IN AWARDING AND ACTUAL PAYMENT OF COUNSEL FEES.

3. ASSIGN ADDITIONAL ADMINSTRATIVE LAW JUDGES.

THE TIME LAPSE BETWEEN THE FILING OF AN ORIGINAL CLAIMS BENEFITS APPLICATION AND THE AGENCY'S ACKNOWLEDGEMENT OF RECEIPT OF APPLICATION REFLECTS THE ADMINISTRATIVE LAG WHICH RUNS THROUGHOUT THE PERIOD FOR PROCESSING OF THE APPLICATION. IN INSTANCES THIS HAS GONE ON FOR 6 MONTHS TO 1 YEAR.

CASES ARE TRANSFERRED FROM ONE EXAMINER TO ANOTHER, AND FROM ONE OFFICE TO ANOTHER OFFICE, WITHOUT NOTIFICATION TO CLAIMANT. THIS RESULTS IN CASES REMAINING IN LIMBO FOR MONTHS AND AT TIMES A YEAR OR MORE.

MEDICAL INFORMATION, MARRIAGE LICENSES AND OTHER PERSONAL DOCUMENTS REQUESTED MAKE A CASE DORMANT LONG AFTER THE INFORMATION IS SUBMITTED - WHILE THE CLAIMANT THINKS THAT IS ALL THAT IS NEEDED TO COMPLETE PROCESSING OF HIS CLAIM.

CLAIMANTS' LETTERS OF REJECTION ARE MAILED AFTER THE APPEAL PERIOD HAS EXPIRED. THERE HAVE BEEN MANY CASES OF THIS SORT NECESSITATING FILING OF NEW APPLICATIONS AND LOSS OF RETROACTIVITY RIGHTS.

WITH REGARD TO COUNSEL FEES, IT IS COMMON TO WAIT TWO (2) YEARS FROM

THE ORIGINAL FEE PETITION, AFTER A FAVORABLE AWARD, UNTIL ACTUAL PAYMENT. THERE IS NO JUSTIFIABLE REASON FOR THIS, FOR LAWYERS, LIKE OTHER PEOPLE, RENDER A SERVICE. DOCTORS WOULD NOT TOLERATE HAVING THAT KIND OF DELAY BETWEEN THE SUBMISSION FOR PAYMENT AND THE ACTUAL PAYMENT, NOR SHOULD ATTORNEYS AT LAW, AND THIS HAS CAUSED A GREAT NUMBER OF LAWYERS TO REFUSE TO REPRESENT CLAIMANTS IN BLACK LUNG MATTERS, KNOWING THAT IF THEY ARE SUCCESSFUL THEY WILL NOT BE PAID FOR SUBSTANTIAL PERIODS OF TIME. IT WOULD BE FAR MORE EQUITABLE IF SOME CONSTRAINT OR REGULATION CONCERNING PAYMENT WERE INSTITUTED, AND ALSO, WHETHER OR NOT SOME CONSTRAINT WOULD BE THAT A FINAL DECISION IN A BLACK LUNG CASE MUST BE MADE WITHIN A PRESCRIBED PERIOD AND LIMITATION AFTER THE CLAIMANT HAS FILED HIS PETITION. WITH REGARD TO THE COUNSEL FEES, THE DELAY IN THE PAYMENT TO ATTORNEYS HAS CAUSED SOME ATTORNEYS TO BE TEMPTED BY THE OFFER OF SUCCESSFUL CLAIMANTS TO PAY THEIR LAWYER, WHO FEEL THEY HAVE RENDERED THEM AN INVALUABLE SERVICE AND SHOULD BE PAID, AND OFTEN TIMES HAVE DONE SO, CONTRARY TO THE REGULATION AND LETTER OF THE LAW.

AS TO THE THIRD AREA OF HOW IMPROVEMENT CAN BE MADE IN THE BLACK LUNG

SYSTEM, ADDITIONAL PERMANENT ADMINISTRATIVE LAW JUDGES SHOULD BE APPOINTED IN THE CONCENTRATED AREA WHERE BLACK LUNG PETITIONS ARE FILED AND SHOULD BE DESIGNATED UNDER THE DEPARTMENT OF LABOR TO HEAR A PRESCRIBED NUMBER OF CASES WITHIN A PRESCRIBED PERIOD OF TIME TO RENDER DECISIONS, THE SUBSTANTIAL BACKLOG CAN BE ELIMINATED. THE TRANSFER OF ADMINISTRATIVE LAW JUDGES FROM OUTSIDE OF THE AREA IN WHICH INDIVIDUALS FILED CLAIM IS NOT A WORKING PROCESS, SHOULD THERE BE SOME CONFLICT WITH A CLAIMANT, HIS ATTORNEY OR SOME OTHER UNFORESEEN MATTER, THEN THE ULTIMATE HEARING MAY PUT OFF UNTIL SOME FUTURE TIME, WHICH AGAIN CAUSES SUBSTANTIAL DELAYS.

I BELIEVE THE TIME HAS COME TO CONSIDER FURTHER STEPS WHICH WILL BETTER ADMINISTER THE BLACK LUNG AND ACCELERATE THE PROCESSING OF CLAIMANTS' APPLICATIONS FROM FILING OF ORIGINAL PETITON THROUGH FINAL DECISION, INCLUDING HEARINGS BY ADMINSTRATION LAW JUDGES & PAYMENT OF COUNSEL FEES.

THANK YOU - MR. CHAIRMAN FOR HAVING CHOSEN WILKES-BARRE AS THE SITE FOR YOUR HEARING AND WE HOPE THAT YOUR TIME AND EFFORTS WILL BEAR FRUIT AND BRING SOME ORDER TO WHAT HAS BEEN A FRUSTRATING ADMINSTRATION OF A MUCH NEEDED HUMANE AND GOOD LAW.

THANK YOU.

Mr. MURPHY. Thank you very much, counselor. Attorney Tom Makowski.

Mr. MAKOWSKI. Thank you, Mr. Chairman.

STATEMENT OF THOMAS A. MAKOWSKI, ESQ.

Mr. MAKOWSKI. Chairman Murphy, Congressman Gaydos, and Congressman Kanjorski.

It is a distinct honor and privilege to appear before you today on the subject of the serious backlog of black lung cases before the office of administrative law judges of the U.S. Department of Labor. As you know, this problem has been building seriously for some time. I appreciate the opportunity to present my opinions regarding these claimants' cases to you today. The need to expedite these hearings cannot be understated. It has come to the point where Congress must do something to alleviate the serious backlog of cases in order to get the benefits into the hands of the miners, their widows and their dependents, who are in need, and have waited long enough.

Since 1969, when the first black lung law was enacted, the number of potential claimants has grown tremendously. Congress has on many occasions, duly revised the law in order to allow more miners to receive the benefits that were intended for them. It is clearly that time again.

In the beginning little was known about black lung. Congressmen such as Carl Perkins of Kentucky, Dan Flood and John Dent of Pennsylvania, took a great interest in the miners and their plight. Unfortunately, the standards at that time for determining whether a miner was suffering from black lung were not clear, and the Social Security Administration handled these claims with great difficulty. Congress subsequently amended the law several times in order to add needed expertise to the cases. Eventually the Department of Labor was given jurisdiction within which the present cases are being handled.

As time went on, more and more miners began filing claims after contracting this dreaded disease. Many of them who filed late in their life died before a decision was made on their case. These were men who worked in the mines when there were very little standards with regard to health and safety, and it was for these men that Congress enacted the initial legislation. In northeastern Pennsylvania itself, where coal was a vast industry, we have experienced as great a tragedy as any part of the United States with regard to these miners and the benefits that they so aptly deserve. Stories of men and families waiting 7, 8 or 9 years for benefits is not unheard of.

Through the years, the standards have gotten more rigorous with regard to the sufficiency of evidence needed to prove a claim that a miner has black lung. As Congress made standards stricter, the regulations became more and more confusing, not only to the claimants, but to the attorneys and the administrative law judges as well. Doctors would be called to testify as to what they believed caused the illness of these miners, but the application of this evidence to the regulations was still not enough for some claimants to receive benefits. Ultimately, Congress felt that it was necessary to establish a rebuttable presumption in the law, that if a miner spent a certain number of years working in a coal mine, he was presumed to have black lung. The burden would then shift to the Government to present evidence at the hearing to defeat the claimant's case. Regrettably, of those cases heard, many deserving claimants were deemed ineligible.

Some Congressmen felt that it was necessary to establish even an irrebuttable presumption in the law; that if a miner proved that he worked a certain number of years in a coal mine he was conclusively presumed to suffer from this crippling lung disease. This, however, never came to pass.

In recent years, the Department of Labor has received a great number of appeals from initial decisions regarding black lung claims. As pointed out by Congressman Kanjorski and other Members of Congress throughout the years, the inability of the administrative law judges to hear all of these cases and give claimants their day in court, has led to the backlog which we are experiencing today. Indeed, the General Accounting Office, who has undertaken studies of this case backlog, estimates that there are more than 20,000 cases pending before Federal administrative law judges. Surely, if each claimant were to be given their right to a hearing, most of these sufferers and their families would never benefit from this workmans' compensation program because of the time that would be involved in adjudicating these cases. It is for this reason, that the assistance of Congress is again needed in order to alleviate the backlog which cannot be handled by the present staff of administrative law judges.

My first experience with black lung cases came when I was legislative assistant to Congressman Daniel Flood in the 1970's. I recall vividly the number of telephone calls and letters that Mr. Flood received each day asking for his help in attempting to secure black lung benefits for claimants. It was a large task. While Mr. Flood would inquire on behalf of every claimant who wrote or called him, clearly the administrative law judges could not grant a hearing to all those claimants who had already begun that appellate process. Many miners died waiting for a hearing to receive their benefits.

In addition, it became obvious that the stricter medical standards imposed on these claimants made it increasingly difficult for them to prove their case. Each time Congress tried to alleviate a problem in the law it seemed to get progressively worse. While Congressman Flood and others experienced great frustration in this regard, they moved forward to attempt to streamline the law and make it easier for the administrative law judges to understand what was required of them and therefore, to reduce the caseload. Unfortunately, to this day the Department of Labor's regulations are still a major stumbling block to claimants and ALJ's.

Since 1981 the backlog has gotten even greater. The amendments in that year made the medical standards even stricter. There is no question that in working with these standards the administrative law judges have a very long task ahead of them. It is for this reason and many others, that we all believe suggestions are appropriate for a possible solution to this problem.

We ask that first, Congress create additional administrative law judges and place them in high density black lung areas in order to hear cases at a speedier rate. This, I believe, is a must. I understand that present legislation proposed by Congressman Kanjorski and others regarding the borrowing of administrative law judges from other Federal agencies is seriously being considered. Unfortunately, I see some problems with this solution.

As stated earlier, the regulations and the law itself have become extremely difficult for lawyers and ALJ's to understand. In this regard, I feel it would be extremely difficult to bring an administrative law judge from another field of expertise, and ask him to digest and to make decisions based upon the very specific black lung law and regulations. I believe that we may find this may further prolong the backlog of these cases. While I applaud the Congressman for his innovative ideas with regard to the present problem, I believe this will not be the end of our plight.

I feel a more suitable alternative for this legislation would be an additional appropriation for more law judges in the Department of Labor who are trained in the area of black lung cases and who could rapidly assist in diminishing the backlog of these cases. It might even be considered that these law judges be appointed on a temporary basis in order to alleviate the backlog.

In addition, it may be beneficial for Congress to review the regulations promulgated by the Department of Labor in order to streamline them and to make them more clearly understood by all concerned. I believe that some of the problems are created by the technical aspects of the law that must be digested and applied to each case before it comes before a judge. While some people think their medical evidence may be clear, it has been related to me on many occasions that when medical evidence is applied to the standards promulgated by the Department, it is still not clear whether a person should or should not be awarded black lung benefits.

Next, I refer to the process by which attorney's fees are awarded. The present system allows for attorney's fees to be submitted through the Department of Labor. It sometimes takes as long as 2 years before lawyers are paid. In addition, the Department of Labor has the authority to reduce attorney's fees as they see fit on a case-by-case basis. I believe that both of these criteria are a disincentive for lawyers to take black lung cases. Many of my colleagues have stated unequivocally that they would not take black lung cases because of the delay in receiving the pay for their work as well as the possibility that they may receive no fee at all.

I do believe that lawyers provide great assistance to claimants in preparing their case. This is not only true about presentation of the case before the administrative law judge, but also has to do with the documentation of evidence, both medical and otherwise, prior to any hearing. I believe that in many cases, if claimants had been represented by lawyers, they may have been more prepared, and it may have been easier for the administrative law judges to make a decision.

Congress should, therefore, consider legislation which would provide for attorney's fees to be paid in a more equitable manner in order that more lawyers might be interested in getting involved in black lung cases. I clearly feel that a lawyer would provide additional expertise on the part of a claimant that will help to diminish the caseload through the appeals process.

Another consideration I believe may be of some assistance. Congress clearly has the power to advance many of these cases to the next stage of litigation which could be an appropriate U.S. Federal court. While the burden on Federal judges is already great, and I understand this, I do believe that many black lung cases can be heard by these judges since many are familiar with black lung legislation and also have large staffs which can assist them in rendering decisions on a more speedy basis.

In this light I offer the possibility that statutory deadlines be set for cases to be heard by administrative law judges, and that if such deadlines are not met the claimant be offered the possibility to proceed directly to Federal court. Obviously, there may be problems which would have to be investigated by the subcommittee staff with regard to the Administrative Procedure Act. I do feel, however, that it would be of great fairness to many of the claimants whose cases are not heard by administrative law judges within a specific period of time to be able to proceed to court.

To close, I point out that congressional findings have declared that black lung legislation was proposed in order to give benefits to coal miners who are totally disabled due to pneumoconiosis, and that it was meant to insure that future adequate benefits are provided to the coal miners and their dependents.

I implore the members of this committee to make other Members of Congress aware that the time for relief is now. I am sure that you have heard over and over again that miners simply and plainly need their day in court. Please don't let this initiative that you started lapse.

I would like to commend the members of this committee, especially Chairman Murphy and Congressman Gaydos for their keen interest and sincere desire to help all those miners affected by this dreaded disease. I would also like to commend Congressman Kanjorski whose vast constituency is in need of help in this area of legislation, for his untiring efforts to bring about a solution to this problem. I pray for the day when coal miners who suffer from this disease can say that their case has been heard and duly and appropriately decided, and that they received the benefits to which they are most assuredly entitled.

Again, I would like to thank the members of the committee and Congressman Kanjorski for allowing me to appear before them today and I am hopeful that my suggestions will be helpful in assisting you in finding a solution to this problem.

Just a personal note, Congressman Murphy, Mr. Chairman, Mr. Gaydos, good friends of mine, we really appreciate you coming to Wilkes-Barre today. It's good to see old faces. I miss Washington a little bit.

Thank you very much.

Mr. MURPHY. Thank you very much, Mr. Makowski. If you'll remain with us for a question or two. In the ALJ breakdown we found the same in our field hearings and in Washington. That is, the administrative law judges are taking a tremendously long time to adjudicate the cases. And then finally, just about every case now is going on appeal before the benefits review board.

Attorney Koschoff, you, I think mentioned at one point that the ALJ should be taken out of the process. Did I understand you correctly?

Ms. **Koschoff**. No; I had indicated that I agreed with Congressman Kanjorski about setting them up as an independent body. I believe that having administrative law judges who are directly under the Department of Labor and, therefore, another employee in the same process takes away a little bit of the objectivity.

Mr. **Murphy**. In other words they should be ALJ's or equivalent, but that they should not be employees of the Department of Labor who are in charge of——

Ms. **Koschoff**. They should be an independent judiciary body I believe.

Mr. **Murphy**. They're supposed to be, but they are assigned to the various departments, Social Security, the various agencies.

We mentioned at one occasion, and, Mr. Makowski, you made reference to this and I believe Attorney Cefalo did too, about the temporary assignment or temporary appointment and when we asked that question of the Department of Labor people they said well we just can't go out and hire qualified attorneys as ALJ's and tell them they're only going to be with us *x* number of months or even years. What's your sentiment on that? Do you think we have a sufficient corps of lawyers out there who would be willing to accept a temporary full-time position?

Mr. **Makowski**. I believe that you would, Mr. Murphy. I do think that there are sufficient lawyers that are familiar with black lung legislation and regulations that would be more than willing to assist in alleviating the backlog. Obviously you're going to have problems with lawyers that might have conflicts, that have continuing cases and they would have a problem with their own caseload, but I do believe that some lawyers that may not have a great expertise in the black lung area may be able to be trained over a period of time if that's required so they would be able to handle the cases on a temporary basis.

Everytime anyone goes to Congress and asks for additional things everybody automatically thinks of an appropriation of money, and I am no exception. I understand the problems that you run into with that. But the fact of the matter is that if you tell them it's a temporary situation it may be easier to get something like that through the Committee so that there is not the idea that there's going to be permanent ALJ's sitting around after the backlog is finally cleared up with nothing to do.

I do believe that you would find the lawyers, a sufficient number of lawyers, that would be interested in that and, of course that would be a weeding out process; I believe the Department of Labor would have to get involved in.

Mr. **Murphy**. Mr. Cefalo?

Mr. **Cefalo**. I agree with Mr. Makowski about the indication that there are a sufficient number of lawyers, but I think the rationale might be the same if we needed additional doctors. No one would sit around and say, well, do we have enough doctors and can we train them and should we hire them? I think it's as important to have decisions in these cases, not only for their physical but the mental well being of the survivors and the recipients. And if you needed mechanics or you needed people to do things, this country has always been great to devise a system to get enough of America involved. In this particular instance you need the legal profession. I think that you can get lawyers to do that, or what you can do is put constraints upon the administrative process at this point to have them render decisions. All of us who are lawyers in the legal profession know that if there was a mistake at the lower level you can have it perfected at some other level, but let the person at least have the opportunity to be heard, to have a decision. Mr. Murphy, the problem in this case is that they don't even acknowledge them.

I have written to the Department of Labor, and I wish there was a way for the legal profession to challenge some of the administrative process that is now in existence and dismantle it and rebuild it. And the only way we can do it is to come here today.

Mr. Makowski and my fellow colleague here, we represent black lung claimants because we are concerned for the people. If not, a lawyer has to be insane to take a case. It costs him staff time. It costs him expenses in every direction. It costs him additional problems with getting witnesses and doctors to cooperate and come, and then he finds that the process is not working. If he's not successful he doesn't win. And the other thing is he has a tremendous amount of aggravation with people calling and saying, "Can't you do anything?" I can now say, Mr. Makowski and my colleague here can say, we've done it. We've come here and we've testified and we have asked, and we're begging on the claimant's part, we're begging you to go there and to get your brethren to agree that we need an overhaul to this system. We need an overhaul and we need it quick.

Thank you.

Ms. KOSCHOFF. Mr. Murphy, if I may make an additional comment, I'd like to follow up on something that Attorney Makowski said earlier and that is the importance that the administrative law judges hearing the claims be very well versed in Federal black lung law, because as Attorney Makowski has indicated, with the changes that came through and some of the complexities of understanding those regulations there is nothing as frustrating as having someone hear a case who doesn't understand what it's about.

In line with that I must add are judges that don't know anything about black lung. I can't tell you how many of my clients have to explain to a judge what a breaker is. What is drilling? What is firing? Is that a fire? What is a uke? Is that a pickup truck?

To have a client have to explain to a judge things about the basics of coal mining really becomes an important and crucial issue especially if they were independent miners whose credibility is going to be judged on that particular administrative law judge's ability to understand what coal mining is all about.

I recently went to a hearing where the client was an 85-year-old man with Parkinson's disease who could barely communicate. He had extreme difficulty even understanding his wife's name, and to see him cross-examined about coal mine work because the judge did not know anything about being in the anthracite region or black lung, afterward the man could barely walk, went over the judge and said, "I'm sorry, Your Honor, but do you mind if I ask you something? Have you ever been around the anthracite industry? Do you know anything about coal mining?" He said, "Well I can't say that I do." He said, "I didn't think so." And that's a very big problem.

Mr. **Murphy**. Mr. Gaydos.

Mr. **Gaydos**. Let me first congratulate the area. I think they're very fortunate by having fellows like Mr. Cefalo and Tom who worked for Dan part of the time, and I've got to put this on record that when this act was being debated on the floor of the House and was being considered, and the whole concept was laid open to the consideration of the Nation, I think Mr. Cefalo, you were back in that little cubbyhole off the floor of the House, handling the library.

Mr. **Makowski**. Trying to explain to the Members from the other parts of the country what black lung was all about.

Mr. **Gaydos**. That's exactly right. And when Mr. Semko, the president of the United Mine Workers was testifying, I remember the technical problems we had when we passed this legislation, and how much we had to rely on the United Mine Workers and their persistence and support both technically and otherwise.

But let that be as it may. Let me say, No. 1, the area is extremely fortunate, to have people that have been interwoven with the concept of black lung and that consequently, as I see it in my humble opinion, will make for a better and more dedicated type of representation and hopefully the results will be better.

But let me be practical. When you're talking about additional appropriations, you're not going to get it from this administration. I want you to know that. I happen to chair one of the subcommittees on Education and Labor, and that's Occupational Safety and Health which has jurisdiction over the Mine Safety Act. And Mr. Murphy has a corresponding subcommittee. We're about the two old, what they call coal rats, that are left on the big committee, Murphy and I. Flood used to be very supportive, and John Dent was on the committee, but our committee burdens have all changed. Now we're going to be depending upon Mr. Kanjorski when we get out there and we debate and argue and hopefully attract some support from some of our colleagues, people that know something about black lung. And what we try to do, for want of a better descriptive term, this most humane of humane legislation. This act was the first time the Congress ever tried in the history of the country to put on the books a Workman's Comp Act. This is the beginning of it. What's going to happen in the future I don't know, but I want you to know No. 1, other areas of Congress, including the Occupational Safety and Health needs of the country which I know what the budget figures are, we're getting cut down. We just don't have the money. So when you talk about money please don't mislead yourself. You're not going to get additional appropriations, Mr. Makowski and you know that.

Mr. **Cefalo**. We still have a Democratic Congress. Is the House still Democrat?

Mr. **Gaydos**. You've got to have somebody sign that law, too. Here's what we're talking about. Mr. Murphy——

Mr. **Murphy**. We hear that just about every week.

Mr. **Makowski**. When I was with Mr. Flood I did his Labor/HEW work, I'm very painfully familiar with how difficult it is to get appropriations, and I realize I'm asking for something that may be difficult. But I understand that that also might be a very real solution to the problem.

Mr. **Gaydos**. Let me suggest, and I'll yield to you in a minute. Some of these recommendations you make I think have great merit. I think they do, I really do. But I just want to admonish all those that are here, and if I could control the news media I'd like to have them do it too. I don't know whether I can or not, obviously I can't. But you have to have a will to want to effectuate and support an act. If you don't have the will to do that, a desire to enforce what law you have on the books, so to speak, you've got some problems.

I want to commend Mr. Murphy, and I've worked with him very closely and I know of his authenticity and his desire to correct this situation. I want to commend him. But if this is the only way we'll get action, I know he has a tough job in the firm. We're going to help him. Paul and I are going to support him as much as we can, but this is very difficult under the circumstances taking into consideration what's going on in Washington.

Suggestions are very good. I have no specific questions to ask you. Very good suggestions. I'm going to study them, I know all of us are, and I want to end up by commending this area. My two colleagues in particular, not to the exclusion of this very confident and interested and loquacious and very competent attorney whom I don't know personally, but I want you to know that the people's needs and the workers' needs in this area are well served by you three legal people. We don't have that throughout the country. I want to tell you that. It is a specialty. For representing the clients of this nature is a specialty and a lot of people aren't doing it today and we've found that, haven't we, Mr. Chairman, because the pay isn't there. They don't want to take it because they have large amounts of money tied up in many different things, and they never get paid and sometimes they don't get paid. So it's almost from the heart that it has to come.

So I want to conclude by saying thanks for your very meaningful suggestions that you have. And I want you to know that the three of us—and we're so grateful Paul's with us because he brings that knowledge. We have very few people on that committee even, let alone the whole Congress, that have a working understanding and knowledge of black lung and all of its ramifications. The utter misery and all the suffering, and just the plight the people are in. So we have a job cut out for us. Thank you, Mr. Chairman, for allowing me to express those feelings at this point in the record.

Mr. **Murphy**. Mr. Kanjorski.

Mr. **Kanjorski**. Thank you, Mr. Chairman.

I'd like to commend all three of you, Mike, Helen and Tom, if you don't mind if I call you by your first names. In having been a practicing lawyer in black lung and having been an administrative law judge on the State level myself, I know the frustrations.

Let me ask a few questions. Are you satisfied that perhaps we couldn't have a system where we had knowledgeable attorneys that would qualify themselves to be administrative law judges on a case-by-case method and would exclude themselves from practice of that field otherwise? Do you think that's a workable proposition?

Mr. CEFALO. I think it's a workable proposition if you can get sufficient numbers of experienced and qualified lawyers to serve on that basis. But if you get individuals who do not have any experience, who do not have any expertise, then maybe it's going backward, maybe you might do destruction to the program by having a lot of decisions which would be faulted later and which may be in the same vein of having no decision at all.

Mr. KANJORSKI. Let me say that my experience as a practicing attorney here, when the law first came out, I would say 75 percent of the bar readily represented claimants. Would I be correct to say that probably something less than 15 percent of the bar now take black lung cases?

Mr. MAKOWSKI. I would say you're correct.

Mr. KANJORSKI. I know in my office, one of my largest requests that I have a difficulty in following is to attempt to get attorneys to represent people because of the complexities. And then when it's all done, we do have a great bureaucracy in challenging attorneys' fees. I just want you to know I don't think there's a lawyer that's practiced before black lung that hasn't in utter frustration thrown up his hands and said, "Why do I have to justify a $500 or $600 fee and spend as much time justifying it as we took to try the whole case?" Do you find that your experience? Have all of you had that problem?

Mr. MAKOWSKI. Yes.

Mr. CEFALO. Absolutely. There have been 26 cases in my office where we have been awarded fees and haven't received them in over 3 years. I'd like to sue the Government if I can, but I think that just might hurt me. I think there should be some interest.

But in the criminal justice system what happens, and this is very significant. What happened in the criminal justice system is, the lawyer said no, absolutely not going to take the case. The Federal magistrates called you in and the Federal judges called you, and after the Federal judges called you and you said no, the Federal judges at that point realized there was a problem.

The black lung claimants don't have anybody.

Mr. KANJORSKI. Right. These are all contingency fees. Not contingency on the fact that you will get a percentage of the award, but that you will be paid only if you win. So Ms. Koschoff indicates there, on a 4-percent winning on the first submission, have you done any statistics. What is it, 1 in 10 that ultimately win? Or one in, it can't be a great number. Maybe 20 percent of all applicants win at this point.

So these attorneys who handle these cases 80 percent of the time never receive any compensation. Then when they do win a case, they're argued with. So it's a very discouraging feature. But I want to tell you this, that since I've been in Congress, as bad as black lung is, and I think it's horribly administered by the Department of Labor, the Veterans' Administration allows attorneys $15 for representation. As a result, they've found out that you can have 35,000 appeals without lawyers taken. So that most veterans in this country are denied the right to legal representation.

Mr. CEFALO. Mr. Kanjorski, can I ask you a question? When you said on a case-by-case basis, did you mean something similar to masters in the——

Mr. KANJORSKI. Yes, that type of procedure. Under the direction of an experienced black lung judge, say we appointed 10 or 20 black lung judges and then on a contract basis, on an hourly basis, a daily basis, my experience was you find that a black lung case really is not that much in the trial time, it's really a couple of hours. But it's more in the paper shuffling and did you get the marriage certificate in, did you get the right driver's license? Sometimes inane and asinine questions.

Mr. CEFALO. Mr. Kanjorski, they do it in the bankruptcy system. They have a Federal bankruptcy judge and they have trustees. They call them trustees, who are miniature hearing officers who make determinations and finding of fact and take care of the estate, and you can have that here.

Mr. KANJORSKI. Something on a part time basis where you'd exclude yourself from any conflict of interest.

Mr. MAKOWSKI. That's where I see the problem. The suggestion I made was to appoint someone on a temporary basis, to give him a certain case load and say look, you can do black lung for this period of time.

Mr. KANJORSKI. Has anybody done any studies as to the actual administrative cost to try a case is? What does it cost the Federal Government to adjudicate one of these cases as compared to the lawyer?

I'm thinking in terms of time. I know most lawyers charge less than $1,000 a case. That would be probably an average, $700 to $1,000 a case. That represents approximately 14 to 20 hours. Would you assume that a judge spends more time than the lawyer in the preparation of the trial?

Mr. MAKOWSKI. No, nowhere near that time.

Ms. KOSCHOFF. No.

Mr. CEFALO. No.

Mr. KANJORSKI. Well in looking at this backlog of 5,000 cases, if we assigned $1,000 a case to each judge to try them, we're only talking about a $5 million expenditure.

Mr. MAKOWSKI. That's a 5,000 backlog at the Benefits Review Board. It's 20,000 at the ALJ level.

Mr. KANJORSKI. OK, at $1,000 a case that's $20 million. That's not an awful lot of money on a billion dollar program.

Mr. MAKOWSKI. But what Mr. Gaydos said before was well taken, it's a difficult thing. Even if you got the authorization from the committee, I know you probably have a lot of problems with appropriation.

Mr. KANJORSKI. I have implicit faith in Mr. Murphy and Mr. Gaydos.

Mr. MAKOWSKI. As I always have had.

Mr. GAYDOS. We've been putting the heat on them.

Mr. MURPHY. I think we'll see some expediting. The very fact that we've held these series of hearings in the coal areas and in Washington, we now have the Department of Labor's attention that we know what they're not doing. I think we'll see some action, we hope, Gentlemen. What I'm going to do is take the testimony that you three have submitted, and plagarize it, boil it down, and submit it as a recommendation submitted by attorneys to the Department of Labor, if you don't mind.

Mr. **Makowski**. We welcome that.

Mr. **Murphy**. Fine. Thank you very very much for your testimony.

Mr. **Kanjorski**. Mr. Chairman, at this point in the record may I submit written testimony provided to me by Representative Kevin Blaum of the State assembly that he would like on the record in regard to this matter?

Mr. **Murphy**. Yes you may. The testimony of State Representative Kevin Blaum will be admitted to the record without objection.

[The prepared statement of Hon. Kevin Blaum follows:]

PREPARED STATEMENT OF HON. KEVIN BLAUM

ANYONE WITH KNOWLEDGE OF THE HISTORY OF AMERICAN LABOR KNOWS THAT THE MINE WORKERS OF THE PENNSYLVANIA ANTHRACITE COAL FIELDS HAVE ENGAGED IN A LONG AND ARDUOUS STRUGGLE FOR THE DIGNITY THAT SHOULD PROPERLY BE THEIRS AS AMERICAN WORKING MEN AND WOMEN.

THE HISTORY OF THE PENNSYLVANIA ANTHRACITE COAL FIELDS OF ONE OF RAPACIOUS BRUTALIZATION OF HUMAN AND NATURAL RESOURCES, OF DISEASE, INJURY AND DEATH AND A STAGGERING FINANCIAL TOLL TO THE EUROPEAN IMMIGRANTS AND THEIR DESCENDANTS WHO WORKED THE ANTHRACITE MINES.

THE MEN WHO LABORED IN THOSE MINES STRUGGLED WITH GREAT DEDICATION AND BRAVERY, AND MANY DIED, FOR THE FORMATION OF LABOR ORGANIZATIONS WHICH WOULD WIN FOR THEM THE ECONOMIC BENEFITS THEY DESERVED FOR THE SKILLS AND EFFORT THEY BROUGHT TO THEIR EMPLOYMENT.

THEY OBTAINED THOSE BENEFITS CHIEFLY FROM THEIR EMPLOYERS IN THE FORM OF HIGHER WAGES AND IMPROVED WORKING CONDITIONS, ALONG WITH THE HOLIDAYS, VACATIONS AND INSURANCE BENEFITS THAT ARE AVAILABLE TO WORKING MEN AND WOMEN IN OTHER WALKS OF LIFE.

THEY ALSO WON FROM GOVERNMENT THE RECOGNITION THAT THEIRS WAS AN OCCUPATION THAT ENTAILED A SEVERE AND DEBILITATING THREAT TO THEIR HEALTH IN THE FORM OF BLACK LUNG, LONG KNOWN IN THIS AREA AS "MINERS' ASTHMA." SO THAT IN ADDITION TO A LIFETIME OF EXTREMELY HARD WORK FOR MODEST EARNINGS, MINERS OFTEN FACED SEVERE HEALTH PROBLEMS WHICH FORCED THEIR EARLY AND USUALLY LED TO PREMATURE DEATH WITH ACCOMPANYING FINANCIAL BURDENS ON THEIR FAMILIES.

WITH THAT AS THE HISTORIC BACKGROUND THROUGH WHICH MANY OF THE CURRENT BLACK LUNG APPLICANTS HAVE LIVED, IT IS ABSOLUTELY DISGRACEFUL THAT ADDITIONAL STUMBLING BLOCKS ARE PLACED IN THEIR WAY. WHATEVER CAN BE DONE TO REMOVE THOSE STUMBLING BLOCKS MUST BE ACCOMPLISHED WITHOUT FURTHER DELAY.

IT IS DISGRACEFUL THAT THOSE WHO HAVE OVERCOME THE HOSTILE RESISTANCE OF EMPLOYERS TO THE IMPROVEMENT OF THEIR ECONOMIC LOT, AND WHO HAVE OVERCOME THE PHYSICAL DANGERS OF WORKING IN OUR MINES, AND WHO HAVE OVERCOME MANY OTHER ECONOMIC AND SOCIAL DEPRIVATIONS, MUST NOW BE SUBJECTED TO THE INDIGNITIES OF BUREACRATIC INDIFFERENCE.

ON BEHALF OF MY CONSTITUENTS IN THE 121ST LEGISLATIVE DISTRICT OF WILKES-BARRE, I COMMEND CONGRESSMAN KANJORSKI AND THE HOUSE EDUCATION AND LABOR SUBCOMMITTEE FOR ITS INTEREST IN THIS VERY SERIOUS MATTER AND PLEDGE MY FULL CO-OPERATION AS A MEMBER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVE TOWARD RESOLVING IT.

Mr. MURPHY. Before we adjourn the hearing I would like to recognize former State Senator Frank O'Connell and former State Representative Stanley Mahalchik. Both of these gentlemen I had the pleasure of serving with in Harrisburg, and ask you gentlemen if you have anything to offer. Come on up and say hello to us.

Mr. KANJORSKI. While we're waiting for that, Mr. Chairman, may I mention to the Chair that this morning I had breakfast with Senator Musto and he of course is a former Member of Congress and now a State senator, and he asked permission to submit additional testimony in support of these hearings.

Mr. MURPHY. Fine, without objection we will be very happy to entertain Senator Musto's testimony.

[The prepared statement of Senator Musto follows:]

PREPARED STATEMENTS OF HON. RAPHAEL MUSTO AND HON. FRANK HARRISON

Mr. Chairman and members of the Subcommittee: We appreciate your courtesy in allowing us to submit this record statement on an issue of great importance to the people of Northeastern and Central Pennsylvania.

During the time we had the privilege of serving as members of the House of Representatives, we were touched by the plight of thousands of men afflicted with black lung disease. We were also outraged by the delay in processing the claims which they and their widows filed, under the law, for compensation, which, in many cases, they very desperately needed.

The issue we address here today is not the merits of any one of those claims, although we believe that the vast majority of them bear merit. Our testimony here today is directed, instead, to a much more serious problem - one that affects not only the lives of those individuals whose black lung claims are outstanding, but casts a shadow over our system of justice and indeed affronts the guarantee of the United States Constitution that each citizen shall be guaranteed the due process of law.

It is our understanding that there is today a backlog in excess of 21,000 undecided black lung claims. This relates only to those cases at the initial level - that is to say, the level at which the case is to be decided by an Administrative Law Judge. There is in addition a backlog of 5,000 cases on appeal pending before the Benefits Review Board.

The General Accounting Office issued a report last October which concluded that if the adjudication process for black lung claims continues as it presently is, it will require 35 years to eliminate this backlog. You do not need us to tell you that most of these claimants will not live that long.

What we want to tell you is that this backlog is unnecessary.

It is our understanding that the Office of Personnel Management has arbitrarily determined that black lung cases shall be assigned only to Administrative Law Judges serving at the Civil Service level of 15. This is the lowest Civil Service grade held by any Administrative Law Judge. This apparently reflects the priority which OPM has assigned to the adjudication of black lung claims. All of us object violently to that assignment of priority. We believe the vast majority of black lung victims deserve much more.

But the problem goes much deeper. The fact is that there are approximately 30 persons presently serving as Administrative Law Judges holding a Civil Service rating of 15. There are 65 serving Administrative Law Judges in the Civil Service grade of 16. These are assigned mainly to FICA and longshore and harbor cases. These cases currently number about 8,000 and we are advised that this constitutes no appreciable backlog granted the number of judges available to decide them.

The question then is why this Administration has not allowed a transfer of assignments so that judges in the Civil Service 16 category can be assigned to reduce the black lung backlog. It has been estimated that if complete flexibility of assignment were permitted and all 65 grade 16 judges were made available to hear and decide black lung cases, it would still require between 9 and 10 years to reduce the backlog. Of course this would still be an outrageous deprivation of due process to claimants awaiting a decision. But it would be better than 35 years.

For this reason, additional suggestions have been made which we think bear merit. In particular, we endorse the GAO recommendation that retired Administrative Law Judges be retained on a contract basis to hear cases. We also believe that Administrative Law Judges assigned to departments other than the Department of Labor might be transferred into the Department of Labor on a temporary basis to hear these cases.

But whatever must be done, Mr. Chairman, must be done. Apart from the fact that human beings in need of help are being denied it because of the law's delay, there is an even greater scandal involved here. Our Constitution guarantees every citizen who brings a claim in the Court or before the agencies of the United States a right to be heard promptly - a right to have his or her case decided within a reasonable period of time. That is not being done here. The nearly 30,000 black lung claimants whose cases sit today in a bureaucratic backlog have a right to demand what the Constitution guarantees. As former members of Congress from this District, we are here to add our voice to theirs. Whatever must be done to unclog this bureaucratic backlog, whatever must be done to guarantee these people their right to a prompt hearing and decision, that is what must be done. Thousands of black lung victims have a right to that.

Mr. MURPHY. Mr. O'Connell, Mr. Mahalchik, how do you enjoy civilian life now that you're no longer in Harrisburg?

Mr. O'CONNELL. Well I haven't really been a civilian long enough to have any appreciation for it. My retirement is effective about a week from today. Stanley might be an expert on the subject.

Mr. MAHALCHIK. Mr. Murphy, and Congressmen, I could say this, that I'm really enjoying it. I know when I left Harrisburg it took me about 2 years to get over it, but now I'm really enjoying life. Life is too short and sweet.

Mr. MURPHY. I know both of you run into a lot of black lung claimants and you did in your official capacities as well as now out here with your friends. Do you have anything to offer to us in the way of testimony we can take back to Washington with us?

Mr. O'CONNELL. Mr. Murphy, and Mr. Gaydos, and Mr. Kanjorski, I want to thank you for taking the time to come here, and I certainly appreciate the initiative of Congressman Kanjorski in requesting his colleagues to come to this area on this very important issue.

I also would like for the record, and so that the public would be fully acquainted with it, thank you gentlemen for your cooperation on all the years that I have been in State government and my association with you, particularly in regard to this. I have a file full of correspondence to you and you've been very gracious and prompt in responding. And I know very well your sentiments. I've had an opportunity to work with you personally.

I think there's a couple of things that I would like to make for the record, at least my observations.

STATEMENT OF HON. FRANK O'CONNELL, FORMER STATE SENATOR FROM THE STATE OF PENNSYLVANIA

Mr. O'CONNELL. First of all, I wouldn't want anybody to ever get the idea that this is a welfare program or that it's an absolute giveaway because in my judgment it's not. I think it's a penalty perhaps that the Government may be paying for negligence in the past, for not proprieting in the mines and in the working areas the kind of safety features and devices that they should have had to protect them, when these miners were making a contribution both to the economy and in many instances to the national security. I think that's one thing we have to understand here.

The other thing in my observation of the State program, I don't know that the costs are in fact escalating because the number of deceased miners are more than enough to compensate for the new ones coming on. I can tell you, and I think without fear of contradiction, that in the last number of years the State has returned through their meager program several million dollars to the general fund in unused moneys. I would guess that the Federal Government might very well be doing the same thing.

I almost agree with Congressman Gaydos. I am of the opposite political persuasion, but I do and have detected in my work with the bureaucracy almost an intent to stall it. An almost intent to stall it with the express purposes of saving money or being able to carry it over or at least not miss their obligations. To me, that borders on being criminal.

A lot of these miners have the affliction and are denied or delayed, and it's just unconscionable in my judgment to see that happen. Justice delayed is justice denied.

I know, and part of the reason that I got out is because I suffered the frustrations that you do. Congress takes the appropriate action, Congress legislates, and all of it is well intended, and the bureaucrats get it it's chopped up so bad you can hardly recognize it, or they have the wherewithall to put the skids to it or put the sprags to it or slow it down or do whatever they wish to do to it, so I'm going to say Joe Gaydos, you're absolutely correct. I have a lot of appreciation for that because that's the way the system is functioning, and that's regretable. I think the worst thing that can happen is widows and people who have at least been encouraged that they might be able to, are going to receive this, and then an inordinant delay. That just adds a sense of trauma to it and it not only compounds the problem but the mental aggravation is something to behold.

These people running to the mailbox on a daily basis almost hoping that they'll get something in the mail. And worse than that, they're not receiving anything. There is no communication. And that's totally, completely frustrating.

I know what you're up against. I do appreciate it. I am absolutely convinced without any doubt whatsoever that you will continue the good work you've done in the past, and I commend you for that and for taking the time to be here.

Thank you.

Mr. **Kanjorski**. We thank you, Senator.

Senator O'Connell, I'd like to take this opportunity formally. In my testimony I tried to bring out the fact that you and I had an association some 20 years ago. I don't know if you remember it, Frank, but that was one of my first chores as a young practicing attorney in this town when we undertook the study of the Pennsylvania anthracilicosis disaster at that time. And I thought the recommendations made and eventually the General Assembly's remedies and the Governor's remedies did free up our problem here in Pennsylvania. Do you think that type of situation, the addition of law judges, straightening out the pre-trial procedures, and insisting on early trials as we did back in the 1960's would resolve this problem today?

Mr. **Mahalchik**. I don't think there's any question.

Mr. **O'Connell**. Stanley and I worked together with this and the House of Representatives for a good many years. I would encourage that.

My observation, and there was a recommendation here that I think had merit, not only in your bailiwick but perhaps in the State, is to make the administrative law judges independent and not be tied directly or tightly to the particular department or agency because the top can put undue pressure on them and request that they take a particular direction. If they were an independent agency, quasi-judicial so to speak, I don't think they would have that encumbrance.

Mr. **Kanjorski**. I agree with the type of invisible pressures that can be brought.

Mr. **Murphy**. Stanley.

STATEMENT OF HON. STANLEY MAHALCHIK, FORMER STATE REPRESENTATIVE, STATE OF PENNSYLVANIA

Mr. MAHALCHIK. Yes, Paul, I'd like to take this moment to thank you for arranging this meeting here in this coal country of ours of Luzerne County, and to my colleagues, Austin and Mr. Gaydos, that I served with in the House and on the Committee of Black Lung a good many years ago. I happen to be a recipient of black lung myself. I had 36 years in and around the mines.

The thing that I hate to see is these poor fellows that are waiting. I have a lady back here now from Mountain Top. I forget exactly how long she's waiting for hers. But these are the kinds of things. It happens today to each and every one of us.

I had an incident happen in my own family, my brother passed away. My sister-in-law was waiting for her award to come through. Two months after she gets the award she passed away. Now this kind of stuff, it takes so much time in between that the families are suffering.

Every day you pick up the paper you see another United Mine Worker passed away. The obituaries show it every day. That reminds me in 1955 when I went down there, Austin, in those days they were waiting 10, 12, 15 years, the same thing. The fellow was practically dead when he got his award.

Is that compensation of any kind for a man that put 20, 30 years in the mines, and then wait to receive a check, and 2 months later he passes away. I think the freedom is not there as far as the law is concerned to give them whatever they're entitled to now so that they can live a few years and relax.

Paul, let me say this to you and your committee. You're doing a terrific job. The panel that was here prior to Frank and I, Senator O'Connell. They did a terrific job and their presentation was out of this world. They've got a good thought in mind, and I think if you fellows follow up on it we'll be in good shape very shortly.

Thank you very much for inviting me here, and good luck to you.

Mr. MURPHY. Thank you, Senator. Thank you very much, Stan.

Thank you very much, ladies and gentlemen, for participating in this morning's hearing. With that the hearing will stand adjourned.

[Whereupon, at 12:35 p.m. the hearing was adjourned.]

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